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No. 83-

In the Supreme Court of the United States

OCTOBER TERM, 1983

DENNIS LYNCH, Individually And As Mayor Of The City Of Pawtucket, RICHARD A. MUMFORD, Individually And As Finance Director For The City Of Pawtucket, And GUY DUFAULT, Individually And As Director Of Department Of Parks And Recreation Of The City Of Pawtucket, And The CITY OF PAWTUCKET,

PETITIONERS,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER And AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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I

QUESTIONS PRESENTED

I. Does Municipal Sponsorship of a Traditional and Dominantly Secular Christmas Display Which Includes a Creche Violate the Establishment Clause?

II. Does the Establishment Clause Require the Elimination From Publicly Sponsored Christmas Celebrations of All Religious Symbolism Associated With the Holiday?

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In the
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No. 83-

DENNIS LYNCH, Individually And As Mayor Of The City Of Pawtucket, RICHARD A. MUMFORD, Individually And As Finance Director For The City Of Pawtucket, And GUY DUFAULT, Individually And As Director Of Department Of Parks And Recreation Of The City Of Pawtucket, And The CITY OF PAWTUCKET,
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DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER And AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners, the City of Pawtucket, Rhode Island, and certain of its officials, individually and in their official capacities, pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit rendered in these proceedings on November 3, 1982.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit, as yet unreported, appears at Appendix A hereof, pp. A-1 to A-20. The opinion of the United States District Court for the District of Rhode Island appears at Appendix B hereof, pp. A-21 to A-74.

JURISDICTION

The judgment of the Court of Appeals was rendered on November 3, 1982. This petition is filed within 90 days of the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Constitutional Provisions Involved

1. First Amendment to the Constitution of the United States.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. Fourteenth Amendment to the Constitution of the United States.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, lib-

erty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The Courts below have held that a municipality is prohibited by the Establishment Clause from including a creche in a dominantly secular Christmas display maintained on private property during the Christmas season. The display in question, owned by the City, and consisting of a melange of conventional and traditional Christmas symbolism, is erected each Christmas season on the grounds of a national historical museum in the heart of the downtown commercial retail district of the City. That display is only one portion of the City's Christmas celebration which also consists of Christmas decorations situated at other locations throughout the municipality. Traditional Christmas music is presented on sound systems at the location where the subject display is situated as well as at other locations throughout the City. The decision of which review is here sought concluded that a creche could not constitutionally be part of a municipality's celebration of the Christmas season.

For over forty years the City of Pawtucket has erected and maintained traditional displays and decorations throughout the City during the Christmas season. For the past several years, one such display has been located in Hodgson Park, so-called, which is privately owned property situated in the heart of the downtown area. Hodgson Park is owned by a private, non-profit corporation which operates and maintains the nearby Slater Mill Museum, a national historic site. The museum corporation gives oral permission to the City for the Christmas season use of its property.

The Hodgson Park display, the items in which were purchased by the City over a period of years and stored on City property other than at Christmas time, is laid out over the approximately 40,000 square foot area of the Park which straddles the Blackstone River running through the center of the City. The display, spread out along both banks of the river, consists of a large number and wide variety of familiar Christmas symbolism. Traditional Christmas music is supplied to the park area by a public sound system. The display includes approximately 2500 Christmas lights and 12 spotlights. There are Christmas trees, both live and artificial, figurines, wooden representations of stars and trees and snowmen and Disney characters, a wishing well and a large stand which accommodates a live Santa Claus. Attached to the river wall on the east bank of the park is a sign 48 feet in length and 4 feet in height which is illuminated and which reads "Seasons Greetings". The creche which is the subject of the within action is one component of the Hodgson Park display.

The creche itself covers an area of approximately 140 square feet out of the total area of 40,000 square feet. The figurines in the nativity scene range from 5 inches in height to 5 feet. In the area of the park closely adjacent to the creche is the 40 foot high lighted live spruce tree, the wishing well, which is 7 feet high and 5 and ½ feet in width, the "Santa Claus house", which is 14 feet in height and length and 11 feet wide, and a representation of Santa Claus and reindeer, which is 25 feet in length and 15 feet high. In other sections of the Hodgson Park display, there are structures and figures as large or larger than the creche.

None of the activities which take place in Hodgson Park during the Christmas season has any religious character or is in any way connected with the nativity scene situated on the premises. There is an opening ceremony during which the Mayor lights the display and a Santa Claus arrives on a fire truck. Candy is distributed to children who visit the live Santa

Claus (a municipal employee). The wishing well is used as an attraction for children, who speak into it and are responded to through the sound system by a City employee seated in a nearby truck. Because of the physical layout of the display, the visual effect of the creche depends entirely upon the vantage point of the visitor. In the immediate vicinity of the creche it would, of course, be clearly visible, but in many locations in Hodgson Park and on the nearby streets it could hardly be seen or not seen at all.

The City's sponsorship of holiday celebrations is not limited to Christmas. Other traditional activities are sponsored by the City on Memorial Day, Veterans' Day and the Fourth of July. The City's Christmas celebration—especially the Hodgson Park display—is sponsored by the City in cooperation with the downtown retail merchants association, which actively promotes the display as part of the overall Christmas decoration of the downtown area.

The United States District Court for the District of Rhode Island had jurisdiction over this case by virtue of 28 U.S.C. Secs. 1331 and 1343. The District Court opinion concluded that the City's inclusion of the creche in the Hodgson Park Christmas display violated the Establishment Clause through an application of the tri-partite test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Focusing upon the creche rather than upon the display of which it is a part—or upon the City's Christmas celebration of which the display is a part—the District Court held that its primary purpose and effect are the advancement of religion. The District Court also found "excessive entanglements" from evidence that following the commencement of this lawsuit considerable public controversy had arisen. In affirming the District Court by divided vote the Court of Appeals held that public sponsorship of the creche, (1) was suspect and thus was invalid under the "strict scrutiny" test applied by this Court in *Larson* v. *Valente*,

___ U.S. ___, 102 S.Ct. 1673 (1982), and (2) violated the first two portions of the *Lemon* tri-partite test by having a primary purpose and a primary effect of advancing religion.

Reasons for Granting the Writ

The issue in this case is whether a passive and contextually muted display of a creche as part of a dominantly secular municipal Christmas celebration violates the Establishment Clause. If it does it can only be because the First Amendment prohibits government from acknowledging that the birth of Christ is part of the historical evolution of the Christmas holiday.

This petition urges that the decision of the Court of Appeals for the First Circuit is in conflict with decisions of other Courts of Appeal and decisions of state courts of last resort and that the decision involves an important question of constitutional law which has not been but should be resolved by this Court. What the Court of Appeals herein has held in substance is that the Establishment Clause prohibits any governmental sponsorship of the Christmas holiday which includes even a passive acknowledgment of the religious element in the Christmas celebration. In the words of the dissenting opinion below:

> "The fact is, Christmas, with its core religious as well as its secular roots, has become an ingrained part of our culture. . . . To retain the holiday but outlaw these ancient symbols seems to me an empty and even rather boorish gesture. If creches are to be outlawed, so too should stars and carols. And surely, the name itself—Christmas, deriving from 'Christ' and 'mass'—should be the first to go if the Constitution requires the eradication of any and all religious connotations!"

It is submitted that the holding that the Establishment Clause requires government to expunge all religious tradition from cultural holiday celebrations infuses the First Amendment with a hostility to religion which this Court has long eschewed.

The Court of Appeals in this case approved that portion of the District Court opinion which concluded that Christmas could only be recognized by government if its religious components were "separated out" from the secular elements of the holiday. So interpreted, the Establishment Clause would prohibit governmental recognition of religious heritage. The development of the Establishment Clause doctrine does not justify such a prohibition. The existence of and legitimacy of religious tradition in American institutions and American culture has long been recognized by this Court. The constitutional bar against public promotion of religion has consistently preserved the permissibility of neutral acknowledgment of those religious roots which exist in the American culture.

The context in which the City of Pawtucket has included the creche in its Christmas observance is amply illuminated by the evidence in this case. The Christmas display is situated on the property of a national historical museum in the center of a retail commercial district. In the display the creche is surrounded by Santa Claus in many forms, by Christmas trees and stars, a wishing well and a Santa Claus house, a miniature village and musical figures, Disney characters and snowmen, a large lighted "Seasons Greetings" and 2500 colored Christmas lights. The Hodgson Park display cannot be divorced from the other nearby Christmas decorations which the City sponsors and which are purely secular in content. The secular decorations on the exterior of the City Hall are only a few hundred feet from Hodgson Park, and the Christmas music is amplified to City Hall through the same sound system which services Hodgson Park. In the other direction, at the shopping mall corner of Hodgson Park, there is a large Christmas tree at the

foot of the mall. These decorations, together with the numerous symbols, lights, and decorations in Hodgson Park itself, contribute to the dominantly secular tone of the City's Christmas celebration and belie the conclusion of the courts below that its primary purpose and effect are the advancement of religion.

It is respectfully submitted that on the record in this case the creche has no purpose or effect at all apart from its surroundings. It bears no more significance to the City's Christmas celebration than does the historical role of religion bear to the national celebration of Christmas as a holiday. As the dissenting opinion below stated:

> "It must be borne in mind that this creche was but part of a larger display in the same location which included a talking wishing well, a Santa's house inhabited by a live Santa who distributed candy, trees of various sizes, reindeer, and 21 cutout figures including a clown, dancing elephant, robot and teddy bear. The whole melange, including the creche, was nothing more nor less than a potpourri of well-recognized Christmas symbols. Had a solitary creche been displayed in July, one might see it as designed to serve chiefly religious ends, since there would then be no holiday with which it was particularly identified. But creches and Santas in December are as typically symbolic of Christmas as turkeys and Pilgrims in November are symbolic of Thanksgiving."

The question presented by the decision of the Court of Appeals in this case is whether the Establishment Clause requires government in its activities aggressively to root out from its cultural observance all vestiges of the well recognized religious tradition of the American people.

In *Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980) *cert. den.* 449 U.S. 987 (1980), it was held that a nativity scene or other religious symbol in a public school Christmas display under appropriate safeguards of objectivity did not violate the Establishment Clause. The Court held that the constitutional result is to be determined by the context and the manner in which the religious element is presented and not by whether a religious element exists. In reviewing a claim similar to that sustained by the Court of Appeals in this case, the Court in *Florey*, at page 317 of 619 F.2d, stated:

> "The appellants argue that, despite the secular benefits, inclusion of material with a religious theme, basis or heritage invalidates the rules. In support of this assertion the appellants point out that several of appellants witnesses, all of them ordained clergymen, testified that the singing of Christmas carols would have some religious effect on them. But the appellants misread the test laid down by the Supreme Court. As noted, *Lemon* v. *Kurtzman*, supra, permits a given activity if 'its principal or primary effect is one that neither advances nor inhibits religion'..."

Other cases have upheld the constitutionality of including a cross, a creche or a menorah in a publicly sponsored display. *O'Hair* v. *Clements*, 638 F.2d 1231 (1981) *cert. den.* 454 U.S. 878 (1981), 50 U.S.L.W. 3222 (1981); *Eugene Sand & Gravel, Inc.* v. *City of Eugene*, 276 Ore. 1007 (1976) *cert. den.* 434 U.S. 876 (1977); *Meyer* v. *Oklahoma City*, (Okla.) 476 P.2d 789 (1972) *cert. den.* 409 U.S. 980 (1972); *Paul* v. *Dade County*, (Fla. App.) 202 So.2d 833 (1967) *cert. den.* (Fla.) 207 So.2d 690 (1967), *cert. den.* 390 U.S. 1041 (1968).

It is respectfully submitted that the dissenting opinion below is correct in concluding that the Court's decision goes to the essence of the constitutional validity of the celebration of

the Christmas holiday. The secular evolution of Christmas symbolism is not unlike the evolution of the holiday itself; at one time or other, most Christmas symbols—Santa Claus, stars, bells, trees—had religious significance. The creche alone retains religious content but it is still primarily a symbol of Christmas. The Court of Appeals' treatment of the function of the creche in the public observance of Christmas is philosophically inconsistent with the treatment given in other cases. In *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973), the Court of Appeals rejected an attack on the use of public property for a Christmas display which included a creche. At page 69 of 495 F.2d, the Court discussed the religious aspects of the Christmas holiday in the following terms:

> "The creche itself, while obviously a religious symbol, is part of a commemoration of 'the nation's celebration of Christmas as a national holiday, by depicting all the traditional aspects of our national history associated with Christmas'. While the creche is utilized neither to promote nor profane any religion, it is 'intended to be reverential to the religious heritage aspect of Christmas.' "

In applying the tri-partite test to a government activity which contains a religious element, the appropriate focus is not on the religious element but on the activity of which it is a part. As demonstrated by the cases cited above, only by examining the context can the religious element be evaluated as primary—in which case there is a violation—or incidental—in which case there is no violation. Specifically, as applied to the celebration of the Christmas season, the nativity scene is unquestionably a legitimate symbol of a dominantly secular holiday, and if that symbol is presented in a non-promotional manner in a setting which accurately reflects the character of

the national holiday, it does not violate the primary purpose and effect tests. *Florey* v. *Sioux Falls School District, supra.* In *Allen* v. *Morton*, supra, at page 72 of 495 F.2d, the Court said:

> "It would be carrying the logic of the primary effect test to an unwarranted extreme to find in this case that appellant's proof that the creche was a patently religious symbol met its burden of showing that the Pageant is 'an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.' " (Citing *Hunt* v. *McNair*, 413 U.S. 734 (1973).)

In *Anderson* v. *Salt Lake City Corporation*, 475 F.2d 29 (10 Cir. 1973), no establishment of religion was found in the maintenance on county courthouse grounds of a granite monolith inscribed with the Ten Commandments "and certain other symbols representing the All Seeing Eye of God, the Star of David, the Order of Eagles, letters of the Hebraic alphabet and Christ or peace". The *Anderson* Court did not question the fact that a portion of the exhibit was clearly and unequivocally religious but concluded that the religious elements did not constitute the dominant purpose or effect. At page 23 of 475 F.2d, that Court stated as follows:

> "In applying this test we must strike a balance between that which is primarily religious and that which is primarily secular albeit embodying some religious impact. A tempered approach obviates the absurdity of striking down insubstantial and widely accepted references to the deity in circumstances such as courtroom ceremony, oaths of public office, and on national currency and coin. . . . Overzealous rigidity may diminish or ultimately destroy the bullwark we have erected against government interference in matters of religion. . . ."

As of the time of the filing of this petition there is pending in the Court of Appeals for the Tenth Circuit an appeal from the decision in *Citizens Concerned for Separation of Church and State* v. *City and County of Denver*, 526 F.Supp. 1310 (D. Colo. 1981). In that case the District Court expressly rejected the reasoning of the District Court in the within case and concluded that a creche publicly sponsored by the City of Denver during the Christmas season did not result in a violation of the Establishment Clause. The pending appeal is docketed in the Court of Appeals for the Tenth Circuit as No. 82-1022. It is respectfully submitted that the District Court decision in *Citizens Concerned*, *supra*, is compatible with the Courts of Appeals and state court decisions hereinabove cited and that those decisions, and not the decision of the Court of Appeals in this case, represent a correct application of the Establishment Clause doctrine as developed by this Court.

One of the principal issues presented by the conflict between the Establishment Clause application of the Court of Appeals in this case and the applications made by other Courts of Appeals and higher state courts in the cases hereinabove cited is with respect to the appropriate focus for the application of the tri-partite test enunciated in *Lemon* v. *Kurztman*, *supra*. Both the District Court and the Court of Appeals in this case, in applying the tri-partite test, focused almost exclusively on the creche itself which was but one small part of a much larger and generally secularized observance. The record in this case makes it abundantly clear that the creche was not only a relatively small part of the Christmas display in question but also that the Christmas display itself was only one part of a larger municipal Christmas celebration. In consonance with the other decisions hereinabove cited, the Court of Appeals in this case should have applied the tri-partite test not to the creche but rather to the City's Christmas celebration. In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court applied the tri-partite test to the use by students of public university facilities for

religious worship, and applied the tri-partite test not to the religious exercise in question but rather to the university's generalized policy which gave rise to its permission for the religious use of the public facilities. It is submitted that the Court of Appeals' decision in this case represents an unjustifiably narrow application of the tri-partite test which is not consistent with the authorities decided by this Court nor with application of the *Lemon* test made by other federal and state courts.

This Court has often recognized that any government action which benefits religion or acknowledges religion is not *ipso facto* an establishment in violation of the First Amendment. *McGowan* v. *Maryland*, 366 U.S. 420 (1960); *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *Walz* v. *Tax Commission*, 397 U.S. 604 (1970). In *Zorach* v. *Clauson*, *supra*, at page 312 of 343 U.S., this Court stated:

> "...The First Amendment...does not say that in every and all respects there shall be a separation of church and state. Rather it studiously defines the manner, the specific ways in which there shall be no concert or union or dependency one on the other..."

With respect to the national celebration of Christmas as a public holiday, the statement of Mr. Justice Jackson in his concurring opinion in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), at page 236, is especially relevant:

> "The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples."

It is submitted that an additional reason for granting the Writ in this case is the Court of Appeals' application of the decision of this Court in *Larson* v. *Valente, supra.* The Court of Appeals, following *Larson,* held that since the creche is a Christian symbol, the municipal sponsorship of the display including the creche amounts to a denominational preference which is, therefore, suspect and requires "strict scrutiny". Since *Larson* v. *Valente, supra,* dealt with a state statute imposing registration and reporting requirements upon some churches but not upon others, the application of the "denominational preference" premise of that case to a factual situation dealing with government's right to include religious symbolism in public observances represents a novel Establishment Clause principle. The effect of such an approach would be to supplant the tri-partite test of *Lemon* with the "strict scrutiny" test in many situations which have in the past been governed entirely by the *Lemon* test. See *Widmar* v. *Vincent, supra; Stone* v. *Graham,* 449 U.S. 39 (1980); *Anderson* v. *Salt Lake City Corporation, supra; Florey* v. *Sioux Falls School District, supra.*

In dealing with constitutional challenges involving the inclusion of religious elements in governmentally sponsored activities, state and federal courts have, as indicated by the cases hereinabove cited in this petition, consistently applied the *Lemon* tri-partite test. In so doing, their analysis has usually centered upon, (1) whether the religious element in the sponsored activity was primary, and (2) whether its sponsorship constituted an advancement or inhibition of religion. If the existence of a religious incident in public activities is automatically suspect and subject to "strict scrutiny", the *Lemon* test analysis is inappropriate and Establishment Clause doctrine has undergone fundamental revision. Such is the result of applying *Larson* v. *Valente, supra,* to the instant case. The conclusion that a creche makes a Christian display presumptively discriminatory strongly implies the further con-

clusion that government participation in the accepted and familiar national celebration of Christmas requires some compelling justification other than the cultural tradition of the American people. It is respectfully submitted that if the establishment clause requires that, only this Court should so declare.

Conclusion

For the reasons set forth in this petition a Writ of Certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 81-1856

DANIEL DONNELLY, ET AL.,
PLAINTIFFS, APPELLEES,

v.

DENNIS M. LYNCH, ET AL.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *U.S. District Judge*]
(525 F. Supp. 1150 (D.R.I. 1981))

Before
FAIRCHILD,* *Senior Circuit Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

William F. McMahon, with whom *Spencer W. Viner*, City Solicitor was on brief, for appellants.

Sandra A. Blanding, with whom *Amato A. DeLuca* was on brief, for appellees.

Kenneth A. Sweder, *Daniel D. Levenson*, *Gerald A. Berlin*, *Herbert H. Hershiang*, *Alexandra Moses*, *Alan Dershowitz*, *Leonard Zakim*, *Carl Axelrod*, *Susan Estrich*, and *Clayton Gillette* on brief for amici curiae, The Anti-Defamation League of B'nai B'rith and the American Jewish Congress New England Region.

November 3, 1982

FAIRCHILD, *Senior Circuit Judge*. The question is whether the City of Pawtucket's ownership and use of a life-sized Christian nativity scene as part of a city-sponsored outdoor Christmas display situated on private property violates the

* Of the Seventh Circuit, sitting by designation.

Establishment Clause of the First Amendment. The district court held that it does and permanently enjoined the City from continuing the practice. We affirm that determination.

The relevant facts and the arguments of the parties have been carefully and exhaustively detailed in Chief Judge Pettine's opinion at the district court,[1] and thus need not be repeated here. We turn directly to those issues raised on appeal which we think merit discussion.

I. Standing

The district court opinion stated, 525 F. Supp. at 1162:

> "[T]his Court finds that the plaintiffs Kriebel, Goodwin and Frazier have standing to litigate this case. Even before *Flast* v. *Cohen*, 392 U.S. 83 (1968), recognized the standing of federal taxpayers to challenge governmental expenditures on establishment clause grounds, municipal taxpayer standing had been permitted in this area. *See e.g.*, *McCollum* v. *Board of Education*, 333 U.S. 203, 206 (1948), citing *Coleman* v. *Miller*, 307 U.S. 433 (1938). *Cf. Frothingham* v. *Mellon*, 262 U.S. 447, 486-87 (1923) (contrasting stake of federal taxpayer with that of municipal taxpayer for standing purposes). Thus, there is little doubt that Kriebel, Goodwin and Frazier, who pay taxes to Pawtucket, can challenge the City's maintenance of the creche."[2]

Defendants argue on appeal that the district court's analysis of standing is undercut by the Supreme Court's subsequent decision in *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, ___ U.S. ___, 50 U.S.L.W. 4103 (Jan. 12, 1982). They claim that *Valley Forge*,

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[1] *Donnelly* v. *Lynch*, 525 F. Supp. 1150 (D.R.I. 1981).

[2] A footnote to the last-quoted sentence added:

> "These plaintiffs submitted affidavits stating that they are now and have been during the time period relevant to this suit taxpaying residents of Pawtucket. The defendants have agreed that the Court may admit these affidavits into evidence."

severely limiting federal and state taxpayer standing, leaves no room for a distinction between federal and state taxpaying status on one hand and municipal taxpaying status on the other. We do not agree.

At issue in *Valley Forge* was the transfer of a former military hospital, valued in excess of a half million dollars, to petitioner, a church-related college. The Department of Health, Education, and Welfare, pursuant to the terms of a statute enacted by Congress under the Property Clause of the Constitution, had declared the facility surplus real property and then permitted petitioner to acquire the property without making any financial payment because of a 100% "public benefit allowance" computed under the statute. Respondents, an organization dedicated to the separation of church and state, and several of its employees, brought suit to challenge the conveyance as violative of the Establishment Clause. The Supreme Court held that respondents lacked standing, within the meaning of Article III, as either taxpayers or citizens.

In concluding that respondents were without standing as federal taxpayers, the Court distinguished its earlier decision in *Flast* v. *Cohen*, 392 U.S. 83 (1968). As an exception to the *Frothingham* v. *Mellon*, 262 U.S. 447 (1923), general rule disfavoring federal taxpayer standing, *Flast* had held that a federal taxpayer will be a proper party to allege the unconstitutionality of an exercise of Congressional power under the Taxing and Spending Clause where the enactment exceeds specific constitutional limitations on the taxing and spending power. *Flast* thus permitted taxpayer plaintiffs to challenge certain expenditures of federal funds under the Elementary and Secondary Education Act of 1965 as violative of the Establishment Clause. Relying on *United States* v. *Richardson*, 418 U.S. 166 (1974), and *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974), the Court in *Valley Forge* declined to interpret *Flast* as creating a broad right for taxpayers to challenge all federal bestowals of largesse

for religious purposes. 50 U.S.L.W. 4108 n.20. Rather the Court embraced a narrower reading of *Flast* and found the facts before it distinguishable inasmuch as they involved not Congressional action under the Taxing and Spending Clause, but action of an executive department pursuant to legislation adopted under the Property Clause.[3] The Court concluded that respondents lacked standing, in effect holding that the alleged deprivation of the constitutional use of their tax dollars failed to state a cognizable personal injury different from the harm purportedly sustained by taxpayers generally.

In addition, the Court held that the respondents in *Valley Forge* could not claim standing simply by reason of their citizen status. It reasoned that the assertion of a personal constitutional right to a government that does not establish religion is insufficient to satisfy the requirements of Article III, at least in the absence of identifiable personal injury suffered as a consequence of the alleged constitutional error. The Court expressly noted that the psychological consequence presumably produced by observation of conduct with which one disagrees is not sufficient to confer standing even though the disagreement may be phrased in Constitutional terms and the litigant's interest in the Constitutional principle intense. Taking care not to retreat from earlier holdings that standing may be predicated on noneconomic injury, the Court distinguished various cases, including *Abington School District* v. *Schempp*, 374 U.S. 203 (1963). *Schempp* had invalidated certain laws which required Bible reading in public schools. The Court in *Valley Forge* cautioned that *Schempp* cannot be construed to mean that any person asserting an Establishment Clause claim possesses a "spiritual stake" sufficient to confer standing. "The plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause...but because impressionable schoolchildren

[3] In our case, plaintiffs challenge direct expenditures which, though small in amount, in certain respects parallel the disputed expenditures in *Flast*.

were subjected to unwelcome religious services or forced to assume special burdens to avoid them." 50 U.S.L.W. 4109 n.22. The Court found that the respondents in *Valley Forge* failed to allege a comparable injury, or indeed any "*injury* of *any* kind, economic or otherwise, sufficient to confer standing." 50 U.S.L.W. 4109 (emphasis in original).

The *Valley Forge* decision, and particularly its reading of *Flast*, may be fairly understood as a restrictive view of the scope of federal taxpayer standing. So too, certain approving references in the opinion to *Doremus* v. *Board of Education*, 342 U.S. 429 (1952), a taxpayer suit challenging a state Bible reading statute which was dismissed for lack of standing, might arguably be interpreted as meaning that similar limitations on standing apply to state taxpayers. *See, e.g.*, 50 U.S.L.W. at 4107. We find no indication, however, that the majority in *Valley Forge* intended to overrule the long line of cases establishing that municipal taxpayers, in contrast to federal or state taxpayers, have standing to sue to challenge allegedly unconstitutional use of their tax dollars.

Nearly sixty years ago, the distinction was made clear in *Frothingham* v. *Mellon*, *supra*, the seminal decision on federal taxpayer standing. Justice Sutherland wrote for a unanimous Court:

> "The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court. *Crampton* v. *Zabriskie*, 101 U.S. 601, 609. . . . But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation,

> of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity."

262 U.S. at 486-487 (emphasis added). Later Supreme Court decisions, including those cited in the above quotation from the district court opinion, have expressed or impliedly acknowledged the persistence of this dichotomy. Most recently, Justice Brennan's dissent in *Valley Forge*, which was joined by Justices Marshall and Blackmun, and relevant portions of which were endorsed by Justice Stevens' separate dissent, repeatedly noted the vitality of the municipal taxpayer standing rule. Though the majority opinion took issue with various aspects of the *Brennan* dissent, *see, e.g.*, 50 U.S.L.W. 4108 n.20, it made no challenge to the dissent's interpretation of this line of precedent.

In short, we find no clear intent in *Valley Forge* to overturn the long-established rule of municipal taxpayer standing. If, as the dissenters in *Valley Forge* suggested, there is a logical or jurisprudential inconsistency between that rule and the reasoning of the majority in *Valley Forge*, it must be left for the Court to resolve on another occasion.

We conclude that *Valley Forge* did not alter the principle of municipal taxpayer standing plainly established by numerous prior Supreme Court decisions. This is the same course taken by at least one district court subsequent to the *Valley Forge* decision. *See Board of Education of Valley View Community Unit School District No. 365U* v. *Bosworth*, No. 81-C-3403 (N.D. Ill., Apr. 5, 1982). Accordingly, we hold that the district court did not err in finding that the plaintiffs had standing as municipal taxpayers to challenge the City's ownership and use of the creche.

We find it unnecessary to consider the individual plaintiffs' arguments that they have sustained non-economic injuries sufficient to confer standing or the argument of the plaintiff branch of the American Civil Liberties Union that it has standing to represent the interests of its members.

II. Establishment of Religion

A.

The district court's assessment of the merits began with its rejection of defendants' claims that no Establishment Clause problem was raised because a Christian "nativity scene has become [a] largely 'secularized' [symbol] so that its nature or function within the . . . display is not primarily religious," 525 F. Supp. at 1163 (brackets added), and because, in any event, "the erection of the creche has not involved the City in religious activity to any significant degree," *id.* On the first point, the court reasoned that unlike other Christmas symbols such as a star, a bell, or a tree, which "attains a religious dimension only if the viewer understands that it is intended to connote something more than its facial significance, and possesses the key to unlock that secondary meaning," the "creche is more immediately connected to the religious import of Christmas because it is a direct representation of the full Biblical account of the birth of Christ," 525 F. Supp. at 1167; that while the creche may represent non-sectarian ethical aspirations of peace and goodwill that "independent, secular meaning . . . is subordinate to, and indeed flows from . . . [its] fundamentally religious significance," *id.* (brackets added); and that the creche did "not lose its power to make a theological statement" merely because it was erected amidst non-religious decorations in the City's outdoor display, *id.* at 1168. As to the other argument, the court concluded that although the Christmas holiday has gained secular significance, it "remains a major spiritual feast day for most sects of Christians," *id.* at 1163; that "[i]f government can, consistent with the Establishment Clause, declare and celebrate Christmas as a national holiday, it is precisely because . . . the religious elements . . . can be separated out and the secular elements presented more or less in isolation," *id;* that the presence of a secular dimension to Christmas does not justify government entry into the religious dimension, *id.* at

1164; and that therefore the City's conduct could not be dismissed at the threshold as insignificant. We find no error in the court's treatment of these points.

Having concluded that an Establishment Clause problem was raised, the district court proceeded to examine the City's conduct under the familiar tripartite test announced in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). There the Supreme Court stated that for a statute to avoid the prohibition of the Establishment Clause:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' *Walz* [v. *Tax Commission*, 397 U.S. 664, 674 (1970)."

403 U.S. at 612-13 (brackets added).

The district court here found that the City's ownership and use of the outdoor nativity scene was unconstitutional under each of the three tests.

With respect to the first test, the City had chiefly argued that the purposes of including the creche in the display, like the purpose of the display as a whole, were economic and cultural or traditional. The court readily rejected the economic justification, based on testimony in the record by merchants that the creche contributed nothing to the value of the display as a commercial draw to shoppers. 525 F. Supp. at 1170. After more lengthy consideration, the court also concluded that the creche had not been included merely for cultural or traditional reasons as an example of how Americans celebrate the holiday, for it found that no attempt had been made to disclaim any endorsement of the religious message, and more importantly that the only religious heritage and customs acknowledged by the display were those of the Christian majority of Pawtucket's citizenry. *Id.* at 1172. The court expressly held that the City had "tried to endorse and

promulgate religious beliefs by including a nativity scene in its display." *Id.* at 1173.

With respect to the effect test under *Lemon*, the court first found that "people knew that the . . . display was sponsored at least in part by the City" and that "viewers would not regard the creche as an insignificant part of the display." *Id.* at 1176. Relying then on statements of citizens contained in testimony or exhibits concerning their opinions about or reactions to the use of the creche, *see id.* at 1178 n.40, and on the absence of evidence of any attempt to present the creche in a broad, neutral, education context, *see id.* at 1177 and n.38, or "to shift the viewer's attention away from the creche's religious message," *id.* at 1177, the court concluded that "despite its 'passive nature,' erection of the creche has the real and substantial effect of affiliating the City with the Christian beliefs that the creche represents," *id.* The court wrote:

> "Even if the creche does advance the nontheological goals of peace, charity, and goodwill, the Court finds that the appearance of official sponsorship of Christian beliefs that the creche conveys confers more than a remote and incidental benefit on Christianity. By using a religious symbol in a seasonal celebration of a holiday having religious significance for some groups, the City has given those groups special status. It has singled out their religious beliefs as worthy of particular attention, thereby implying that these beliefs are true or especially desirable. This aura of governmental approval is a subsidy as real and as valuable as financial assistance."

Id. at 1178.

Finally, the court found that while administrative entanglement between government and religious organizations had not occurred, the City's ownership and display of the nativity scene engendered division of the polity along religious lines

and thus resulted in excessive entanglement between government and religion. Appraising the facts before it, the court wrote:

> "In sum, the atmosphere has been a horrifying one of anger, hostility, name calling, and political maneuvering, all prompted by the fact that someone had questioned the City's ownership and display of a religious symbol."

Id. at 1180. The court acknowledged that the "Supreme Court has never held that the potential for political divisiveness is alone sufficient to invalidate a government's action under the Establishment Clause," *id.* at 1180, but found that it may properly be interpreted as a "warning signal" that the First Amendment has been compromised. Viewing this warning signal of political divisiveness in conjunction with its earlier findings of improper purpose and impermissible effect, the court concluded that the Establishment Clause had been violated.

B.

Subsequent to both the decision by the district court and oral argument in this court, the Supreme Court decided *Larson* v. *Valente*, ____ U.S. ____, 50 U.S.L.W. 4411 (Apr. 21, 1982), a case involving a challenge to a state statute which denied an exemption from certain registration and reporting requirements to religious organizations receiving more than half of their total contributions from non-members. In striking down the 50% rule as violative of the Establishment Clause, the Court made clear what theretofore had perhaps not been readily apparent, namely that:

> "the *Lemon* v. *Kurtzman* 'tests' are intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions. . . that discriminate *among* religions."

50 U.S.L.W. at 4417 (emphasis in original).

To statutes, such as the one before it, effectively granting a denominational preference,[4] the Court found appropriate a test of "strict scrutiny," which requires invalidation unless the provision in question "is justified by a compelling governmental interest" and "is closely fitted to further that interest." 50 U.S.L.W. at 4416, 4417. Though the lower courts in *Larson* had proceeded under the *Lemon* tests, the Supreme Court applied strict scrutiny analysis. It struck down the challenged 50% rule because even assuming that the state had shown a sufficiently compelling governmental interest in curbing abusive practices in charitable solicitation, the rule was not closely fitted to furthering the asserted interest. The Court noted that while application of the *Lemon* tests was not necessary to disposition of the case before it, "those tests do not reflect the same concerns that [warrant] the application of strict scrutiny." 50 U.S.L.W. at 4417 (brackets substituted). To that extent, the court observed that its analysis and result were consistent with application of the excessive entanglement test to the state statute.

C.

Larson makes clear that because the City's ownership and use of the nativity scene is an act which discriminates between Christian and non-Christian religions it must be evaluated under the test of strict scrutiny. Though (as in *Larson*) the district court did not utilize this standard, we think it can be employed on appellate review (as the Supreme Court did in *Larson*) because of the thorough analysis in the district court's opinion, and because, at least on the present facts, the district

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[4] In *Larson*, the Supreme Court found that the 50% provision:

> "effectively distinguishe[d] between 'well-established churches' that have 'achieved strong but not total financial support from their members,' on the one hand, and 'churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members,' on the other hand."

50 U.S.L.W. at 4416 n.23.

court's negative resolution of the first *Lemon* test—with which we agree—foreordains the result under the identification of compelling governmental interest prong of strict scrutiny.

Specifically, the district court found that defendants, after fair opportunity to do so, were unable to advance any legitimate secular purpose for inclusion of the creche in the outdoor display and that by such action the City in fact had "tried to endorse and promulgate religious beliefs." 525 F. Supp. 1173. We find no error in this part of the district court's analysis. That being so, it follows inexorably that defendants established no compelling governmental interest in erection of the nativity scene. If one is unable to demonstrate *any* legitimate purpose or interest, it is hardly necessary to inquire whether a *compelling* purpose or interest can be shown. We conclude therefore that the first prong of strict scrutiny test is not met, and of course find it unnecessary to address the second prong. The judgment of the district court must be affirmed.

We note that our result is consistent with the district court's finding—with which we agree—that erection of the creche had a primary effect of advancing religion and therefore was unconstitutional. However, we are unwilling to place much weight on the court's determination that the City's actions risked political divisiveness along religious lines. As the court noted, this factor alone has never been held sufficient to invalidate governmental action, and First Amendment scholars have questioned and criticized the political divisiveness strand of the entanglement test on historical and prudential grounds. *See* E.M. Gaffney, Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy, 24 St. Louis U.L.J. 205 (1980); K.F. Ripple, The Entanglement Test of the Religion Clauses - A Ten Year Assessment, 27 U.C.L.A. L. Rev. 1195 (1980); *but see Larson* v. *Valente*, supra, 50 U.S.L.W. at 4417-4418 (Apr. 21,

1982) (discussing in dicta "risk of politicizing religion"). We find it unnecessary to rely on the political divisiveness analysis in the district court's opinion.

D.

Finally, we are aware that our decision is apparently at odds with a recent decision of the United States District Court for the District of Colorado. In *Citizens Concerned for Separation of Church and State* v. *City and County of Denver*, 526 F. Supp. 1310 (D. Col. 1981) (hereafter "*Citizens Concerned*"), that court expressly declined to follow the district court opinion in the present case and held that the erection of a nativity scene as part of the City and County of Denver's annual Christmas lighting display did not violate the Establishment Clause. The court intimated that the difference in result was in part accounted for by the nature of the evidence adduced in the two cases. *See id.* at 1311, 1313. In any event, however, we think it sufficient to note that we have considered the reasoning in *Citizens Concerned* and, to the extent it is legally inconsistent with the present decision, find it unpersuasive.[5]

Accordingly, the judgment appealed from is AFFIRMED.

BOWNES, *Circuit Judge* (concurring). I concur fully in all of the majority opinion but write separately because I believe the dissent is incorrect when it says that Christmas originated as a religious holiday. Celebrations on or near the 25th of Decem-

[5] It perhaps bears noting that the court in *Citizens Concerned* apparently misread the district court decision in *Donnelly*, at least to the extent that it found that *Donnelly* held that a "nativity scene is so exclusively religious that its use by the state is per se objectionable." 526 F. Supp. at 1313. The *Donnelly* decision left open various possibilities, such as government use of a nativity scene as part of a museum display, 525 F. Supp. at 1169, or in a truly educational context, *id.* at 1177 n.38.

ber predate the birth of Christ. In the First Century, B.C., Romans celebrated December 25th as the Natalis Solis Invicti, a feast in honor of the Sun God, Mithras. December 17th through the 22nd was also a festive period for the Romans—this was Saturnalia, a period dedicated to Saturn, God of agriculture, and to the renewed power of the sun. During Saturnalia, slaves were treated as equals of their masters; and a townsperson, chosen by lot, was given the throne, to rule at his whim. Traditions of feasting, visiting, drinking, gift exchanging, and revelling are rooted in these pre-Christian festivals. School vacations for midwinter celebrations are said to trace back to pre-Christian Rome.

Not until early in the Fourth Century, in 336 A.D., do historians find evidence of celebrations on December 25th commemorating the birth of Christ. The Bible gives no direct indication of the date of Jesus's birth. In fact, the eastern portion of the Roman Empire celebrated the birth and baptism of Christ on January 6th. Whatever the date of Christ's birth, however, celebrating that event was intensely opposed by some Christians. The Puritans, believing that the church should not sponsor anything not found in Scriptures, objected to the celebration of Christ's birth because such a practice had no Biblical prescription. They condemned the celebration as "popish" and a "wanton Bacchanalian feast." Baptists, Presbyterians, and Quakers also strongly opposed the religious observance of Christ's birth. On the other hand, Roman Catholics, the Church of England, the Dutch Reformed, and the Lutheran Church celebrated the occasion. In 1643 the English Parliament outlawed feasts of Christmas, Easter and other holy days. Not until 1660 were Christmas celebrations again legal.

The controversy over whether to celebrate Christ's birth raged in the New World as well. In 1613, Captain John Smith celebrated with a feast among the Indians. The Puritans, however, continued their studied refusal to accept Christmas

as a holiday. In 1659, the Massachusetts General Court followed Parliament's lead and enacted a statute making the observance of Christmas Day, by absence from labor, or feasting, or in any other way, an offense carrying a five-shilling fine. Anglicans immigrating to Plymouth, Salem, and Boston gradually softened the severity of the laws concerning the celebration of Christ's birth. Their influence led to a repeal of the statute in 1681. In contrast to the Puritans, Episcopalians throughout the colonies celebrated Christmas as a traditional religious feast. In New York, the Dutch observed an extended holiday period, both religious and secular in nature. December 6th was Saint Nicholas Day for the Dutch, when the Saint was credited with bringing presents to the children. Eventually, due to Anglican influence, the date was shifted to the 25th of December.

Several factors are recognized by historians for the gradual acceptance of Christmas as a holiday. Immigration from Germanic countries, which celebrated Christmas as both a religious holiday and a folk celebration, was an important factor. The rise of Sunday Schools in the first half of the Nineteenth Century also promoted general acceptance of the Christmas holiday embracing the folk customs of the Christmas tree and Santa Claus. K.L. Richards, How Christmas Came to Sunday Schools. The writings of Charles Dickens are credited with having had a major role in Christmas becoming a day of festive celebration; in Scrooge's own words, "a good time; a kind, forgiving, charitable, pleasant time." Another important factor in the increasing acceptance of Christmas as a holiday was the first amendment, requiring the separation of Church and State. "Because of this, members of Puritan and Evangelical churches were less inclined to oppose secular celebration when it no longer symbolized the religious and political dominance of the Church of England." J. Barnett, The American Christmas, A Study in National Culture at 60 (1954).

During the 1800's, secular interest in the holiday spread rapidly. In 1827, an Episcopalian Bishop wrote: "The devil has stolen from us...Christmas, the day of our spiritual redemption and converted it into a day of worldly festivity, shooting and swearing." J. Barnett at 6 citing W.W. Maross, The Episcopal Church 1800-1840 at 178. Advertisements appealing to the gift-giving tradition of Christmas appeared in New York City newspapers as early as 1820, and, by the latter half of the Nineteenth Century, the secular folk aspects were well on their way to outstripping the religious aspect of Christmas.[1]

In 1836, Alabama became the first state to grant legal recognition to Christmas as a holiday. The United States Congress, in 1870, declared Christmas, New Years Day, and the Fourth of July as holidays in the District of Columbia. Congressional debate on this bill was notably lacking in any discussion of the religious nature of Christmas, or of any constitutional issue involved by recognizing the day as a holiday. The stated purpose of the bill was to give the District of Columbia the same holidays recognized by most of the states. Cong. Globe, 41st Cong. 2d Sess. 4529, 4805, 4833, 4849, 4973 (1869-1870). Of course, we can only speculate as to the meaning of the lack of debate. Perhaps it is evidence of widespread recognition of the secular aspect of the holiday; or perhaps it was the result of insensitivity of the Christian majority to the non-Christian segments of our society. In 1885, Congress passed a joint resolution making Christmas a paid holiday for federal employees. By 1890, every state in the Union had acknowledged Christmas as a holiday.

This brief review of the history of Christmas reveals that it is a holiday with both secular and religious dimensions. Today's American Christmas is a result of the mixing of diverse folk customs and religious beliefs in the melting pot of the New

[1] The primary historical sources for this brief exegesis are: R. Meyers, Celebrations: The Complete Book of American Holidays (1972); and J. Barnett, The American Christmas, A Study in National Culture (1954).

World. Christmas has roots that are embedded deeply in the Christian religion; its roots also extend to folk customs and pagan rites that predate the birth of Christ.

The creche, however, is tied firmly to the Christian religion; it tells the story of the birth of Christ, the Son of God. Unlike today's Christmas holiday, the creche is not the result of the combination of folk culture and tradition. The creche is purely a Christian religious symbol; this is the distinction between the creche and Christmas as a holiday. It is a distinction of constitutional significance. Although the government may recognize Christmas as a holiday and even participate in some of its secular traditions, it may not participate in or promote the Christian celebration of Christmas. To view the creche as only one of the many symbols of the Christmas holiday season is to denigrate its religious significance and misinterpret the historical background of Christmas.

CAMPBELL, *Circuit Judge* (Dissenting). As the nativity scene is prototypically symbolic of Christmas—and as Christmas is itself a legal holiday whose constitutionality is not here questioned—I think the court errs in holding that the display in a public park during the Christmas season of characters and animals associated with that scene constitutes "an establishment of religion" within the first amendment. Unassociated, as they were, with the performance of any religious rites, the figures did not "establish" religion in the context in which they were presented. They simply contributed to the message that the holiday they represented was at hand.

It must be borne in mind that this creche was but part of a larger display in the same location which included a talking wishing well, a Santa's house inhabited by a live Santa who distributed candy, trees of various sizes, reindeer, and 21 cutout figures including a clown, dancing elephant, robot and

teddy bear. The whole melange, including the creche, was nothing more nor less than a potpourri of well-recognized Christmas symbols. Had a solitary creche been displayed in July, one might see it as designed to serve chiefly religious ends, since there would then be no holiday with which it was particularly identified. But creches and Santas in December are as typically symbolic of Christmas as turkeys and Pilgrims in November are symbolic of Thanksgiving.

The root of the difficulty lies in the fact that Christmas originated as, and to some people continues to be, a religious holiday.[1] For that reason certain of its established symbols relate to myths bearing, for some, a religious meaning. In Webster's Third New International Dictionary, Christmas is defined as follows:

> An annual church festival kept on December 25 or by the Armenians on January 6 in memory of the birth of Christ, celebrated generally by a particular church service, special gifts and greetings, and observed in most Christian communities as a legal holiday.

Because Christmas memorializes the founder of Christianity and is a church festival, it might be argued that the state and national governments should not be allowed to recognize it at all. Such an argument—unlike, I submit, the court's present position—would at least be logically consistent. In my opinion, the two most logically consistent positions are as follows: either Christmas itself, because of its inextricably intertwined religious roots, cannot constitutionally be a national holiday, in which case displays of the type here in issue would also be unconstitutional; or else Christmas is constitutional, in which case all its relevant symbols, including those depicting the

[1] I do not disagree with Judge Bownes that modern Christmas has many secular and pagan aspects besides. My point is not that symbols portraying the birth of Christ are the exclusive symbols of the season; far from it. My point is merely that such symbols are clearly and inescapably *a part* of the total symbolism of the holiday, and therefore cannot be deleted without committing an act of censorship against the holiday itself.

nativity, are likewise constitutional, *so long as displayed for the purpose of announcing the holiday.*

No one has argued in this case that Christmas as a national holiday is itself unconstitutional. Chief Judge Pettine, it is true, wrote in his opinion below that if the creche is not declared unconstitutional, then Christmas itself might have to be declared unconstitutional. He would thus "save" Christmas by shearing it of all its religious trappings. This is a possible approach, but I wonder if it really works. It seems a little like maintaining a holiday known as "Washington's Birthday" while extirpating all reference to George Washington. Christmas, so long as called by that name, inescapably recalls the birth of the founder of Christianity. To "save" it by pretending to the contrary has an almost Orwellian twist. I do not think constitutional values are furthered by this kind of thinking.

The fact is, Christmas, with its clear religious as well as its secular roots, has become an ingrained part of our culture. Were one today to seek to make a national holiday out of such a church festival, constitutional objections might well prevail. But Christmas is water over the dam. And so, I would argue, are *all* its established symbols, including carols and creches. To retain the holiday but outlaw these ancient symbols seems to me an empty and even rather boorish gesture.[2] If creches are to be outlawed, so too should stars and carols. And surely, the name itself—Christmas, deriving from "Christ" and "mass"—should be the first to go if the Constitution requires the eradication of any and all religious connotations!

I think we should accept what seems obvious—that, for historic reasons, Christmas is a constitutionally valid part of our national life. In having so become, it allows like any holiday the display of its accepted symbols—that and no more. To the extent these carry religious as well as mythical connotations, they must when placed on public property, be shown in

[2] Although no more boorish, perhaps, than the City of Cranston's argument that the real purpose of the creche was to bring shoppers to town.

a manner limited to announcement of the holiday rather than of a religious celebration or the inculcation of religion. The first amendment would plainly not allow the city to pay for a Christmas mass in a public park or the like. But the nativity scene has merged into the accepted Christmas symbolism. When seasonally deployed without accompanying religious ceremonies or message, I do not think it can be said to establish religion, any more than would the piping in of carols or similar activities having a religious base which our society has come to accept as part and parcel of the Christmas season.

I would uphold the constitutionality of the Rhode Island display and reverse the decision below.

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 80-0669

DANIEL DONNELLY, et al.,

v.

DENNIS LYNCH, et al.

OPINION AND ORDER*

PETTINE, Chief Judge.

The First Amendment of the United States Constitution begins, "Congress shall make no law respecting an establishment of religion." By incorporation through the Due Process clause of the Fourteenth Amendment, *Abington School District* v. *Schempp*, 374 U.S. 203, 215-16 (1967), this prohibition against official support of, and affiliation with, religious philosophies and institutions applies as well to the actions of state and local governments. In this case, the Court must decide whether the City of Pawtucket's ownership and erection of a nativity scene as part of its annual Christmas display violates this fundamental restriction on governmental power.

The plaintiffs are the Rhode Island affiliate of the American Civil Liberties Union (ACLU), Daniel Donnelly, George Kriebel, Robert Goodwin and A. Gregory Frazier. George Kriebel is and has been a real estate tax paying resident of the City of Pawtucket since February 1980. Robert Goodwin is

* The Court wishes to express its deep appreciation to Professor Robert Destro of Marquette University School of Law, and Professor Ira Lupu, of Boston University School of Law, who appeared as *amici* in this case. Their scholarly briefs provided invaluable assistance to the Court in resolving the difficult and sensitive issues presented here.

and has been a personal property tax paying resident of said city since 1976. A. Gregory Frazier is and has been a personal property tax paying resident of Pawtucket since 1980. Daniel Donnelly, the original plaintiff, has resided in Pawtucket for four years and is a registered voter there. (I, 7)[1] Although he is liable to Pawtucket for personal property taxes, he has failed to pay them. At all times pertinent to this case the plaintiffs have been members of the Rhode Island affiliate of the ACLU. The defendants are Dennis Lynch, mayor of Pawtucket at the inception of this case and during the Christmas, 1980, display;[2] Richard Mumford, the City's Finance Director and chief fiscal officer (II, 1-2); Guy Dufault, Director of Parks and Recreation and Supervisor of the planning and implementation of the Christmas display (I, 64-66); and the City itself.

This action was filed one week before Christmas, 1980. Plaintiffs initially sought a temporary restraining order requiring immediate removal of the creche from the City's holiday display. At a conference with the Court, the defendants stated their firm intention to continue to include the nativity scene in future Christmas displays.[3] Assured by this representation that

[1] Citations to the transcript in this case will take the form of a roman numeral designating volume and an arabic numeral designating page. "I" indicates the testimony given on February 3, 1981. "II" indicates the testimony given on February 5. The testimony given on February 6 is designated "III", although it is included in the same binding as that of the preceding day.

[2] Dennis Lynch has been replaced by William F. Harty, Jr. as Mayor of Pawtucket. *See* note 3 *infra*.

[3] This intention was reiterated at trial. (II, 53). Indeed, Mayor Lynch expressed his desire to have an even better looking creche next year. (*Id.*) The strength of the Mayor's commitment to maintain the nativity scene if at all possible was manifest in his testimony. *See* II, 53-54, 63-65. While acknowledging his duty to abide by the constitutional rulings of the Court, the Mayor indicated his intention to "figure some other way to have a nativity scene as part of the historical tradition and part of the full Christmas display." (II, 54). *See also* report of the "Good News" interview with Mayor

the issue would not become moot, plaintiffs agreed to withdraw their request for emergency relief in order to permit the Court sufficient time to receive evidence and afford the case the deliberate consideration which the issues deserved. The case proceeded to trial on an accelerated schedule, with the parties agreeing that the Court would then render a final decision on the merits.[4]

In the court of the trial, however, a serious question arose as to Mr. Donnelly's standing as a taxpayer. On August 31, 1981, the Court issued a "Tentative Opinion" holding that Mr. Donnelly lacked standing to litigate this case as a taxpayer. Counsel were advised that the Court was prepared to hear argument on this point. On October 15, 1981 the Court granted plaintiff's motion to amend the complaint to add the other present plaintiffs as parties. Through this motion the original plaintiff sought to remedy the absence of standing.

The filing and litigation of this case have generated an extraordinary outpouring of public comment in Pawtucket and surrounding communities. The facts are as follows:

Hodgson Park, the location of the Christmas display, is a privately owned open space area of approximately 40,000 square feet. (II, 81-82). Bounded by Roosevelt Avenue, Main Street, and Broadway, the Park lies in the heart of the downtown shopping district. (I, 90-91). The City's two largest retail establishments are within walking distance of the Park, as is City Hall. With the private owner's permission, the City enters Hodgson Park each year in November and erects a

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Lynch in Plaintiff's Ex. 12 ("one way or another tradition like this is going to continue. No judge, no jury is going to undermine that.") On the admissibility and substantive accuracy of this newspaper account, *see* notes 14 & 15 *infra*. Since said hearing Mayor Lynch has resigned and has been succeeded by William F. Harty, Jr. A stipulation has been filed that Mayor Harty agrees with and adopts the position of former Mayor Lynch as stated in his testimony, but does not intend to make any additions or enlargements to the display.

[4] The nativity scene thus remained part of Pawtucket's 1980-81 Christmas display.

lighted Christmas display. (I, 65-66, 75).[5] City employees, or city-paid contractors, perform the setup work. (I, 66, 70). The City owns the lights, figures, and buildings that make up the display, (I, 85-90); it reimburses the private owner for all the electricity used by the display. (I, 72). Subject to the final approval of the Director of Parks and Recreation, a City maintenance supervisor designs the layout of the display. (I, 66). The Mayor may make changes in the layout. (II, 52).[6]

The 1980-81 display contained the following:

- a "talking" wishing well
- Santa's House, inhabited by a live Santa who distributed candy
- a grouping of caroler/musician figures in old-fashioned dress, standing on a low platform surrounded by six large artificial candles
- a small "village" composed of four houses and a church
- four large, five-pointed stars covered with small white electric lights
- three painted wooden Christmas tree cutouts
- a live, 40′ Christmas tree strung with lights
- a spray of reindeer pulling Santa's sleigh, set on an elevated runway
- a long garland hung from candy-striped poles
- cutout letters, colored in fluorescent paint, that spell "SEASON'S GREETINGS"

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[5] In past years, the display was apparently located at another site further from the downtown area. Mayor Lynch testified that he was responsible for relocating the display in order to further assist the downtown revitalization efforts, but did not specify when the move had taken place. (II, 53, 78). No evidence was offered about the public or private character of the former site.

[6] The Mayor testified that he had in fact made changes in the display in the past. (II, 52). He did not elaborate on the substance or timing of these alterations, or on the reasons for which they were made. *But see* newspaper clippings in Pl. Ex. 12 stating that Mayor has responded to ACLU's annual complaints about creche by "beefing up" the display.

— 21 cutout figures representing such varied characters as a clown, a dancing elephant, a robot and a teddy bear

— the nativity scene at issue in this case

Also, small colored lights festooned the trees growing in and near the Park. A schematic of the display, prepared by the City,[7] has been filed with the Court.

To visualize the layout of the display, some physical description of the Park is necessary. The Park is roughly bisected by the Blackstone River. (I, 90). The East half rises in a moderate slope to Broadway Street. The West half is bounded by Roosevelt Avenue, a main thoroughfare, and Main Street; it is on this half that most of the display is placed. On this perimeter of the Park, there are four bus stops, two of which have shelters. Two sets of stairs lead down into the Park from the Roosevelt Avenue sidewalk. Persons standing at the bus stops and walking along that sidewalk would have the best view of the display. (I, 114-15).

The nativity scene occupies the foreground of the display. The stable opens towards Roosevelt Avenue and all the figures are visible from that side. Looking down into the Park from the bus stops, the wishing well and Santa's House appear on the extreme left of the nativity scene. Behind and above the creche loom Santa's sleigh and reindeer. To the right of the creche are the live Christmas tree, the small "village," and the carolers, which face Roosevelt Avenue. (I, 94).[8]

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[7] The plaintiffs have received copies of this drawing and do not object to it. Based on trial testimony, various photographs offered as exhibits, and the Court's own view of Hodgson Park (taken after the display had been removed), the drawing appears to be an accurate approximation of the scene.

[8] The Court does not mean to imply by this description that all the elements of the display are fully visible to persons standing at all points on the Roosevelt Avenue perimeter of the Park. As the defendants painstakingly pointed out at trial, what one sees of the display obviously depends to some degree on where one is standing. It is abundantly clear to the Court, however, that the optimal vantage point is the Roosevelt Avenue bus stop area, and that the elements of the display are deliberately placed so that persons standing in that area or entering the Park from the Roosevelt Avenue access steps are seeing the "front" of the display.

The figures in the nativity scene are approximately life sized. (I, 101-02).[9] They include kings bearing gifts, shepherds, animals, angels, and Mary and Joseph kneeling near the manger in which the baby lies with arms spread in apparent benediction. All of the figures face the manger in which the baby lies; several have their hands folded and/or are kneeling. The figures' poses, coupled with their facial expressions, connote an atmosphere of devotion, worship, and awe. The stable is, inexplicably, shored up with two hockey sticks. Some of the figures are chipped, and the paint on several is peeling.

The nativity scene was purchased by the City in 1973 for $1,365. (I, 71-72). No money has since been expended on its maintenance. (*Id.*) This amount was comparable to that expended to purchase the three other large groupings—the carolers, the "village", and Santa's sleigh—that are part of the current display. The creche is assembled, removed, and stored by City workers; these tasks take a total of two worker-hours. (I, 67-68). Some additional time is spent by the City electrician in hooking up two spotlights to shine on the nativity scene. (I, 69). The Parks Director estimated that of the $4,500 spent for these employee services, about $20 was attributable to the creche. (I, 85). The City also spent a small amount, probably under $20, for spotlights bulbs and holders to light the creche, (I, 78-79) and Pl. Ex. 7, and some unspecified sum for the electricity these use. (I, 72).

When the Hodgson Park display is opened, ceremonies at the Park are held in conjunction with those at City Hall, 300 feet away. Santa arrives at the Park in a City fire truck. He and the Mayor throw a switch, illuminating the lights at the Park and City Hall. Santa then goes to his House in the Park

[9] The nativity scene occupies an approximately 10' x 14' area. Testimony was offered as to the amount of space occupied by the creche relative to that occupied by the rest of the display. (I, 91). However, the suggested comparison was unhelpful because the figures were not adjusted to reflect all the groundspace not covered by any building or figure. (I, 118-19).

and distributes candy to the children. The "talking" wishing well also begins operation. The sound system that broadcasts Christmas carols through the Park is the same one used at City Hall (I, 102, 104).[10]

During the trial of this case the Court received testimony from several individuals. This testimony bore on the purchase and the effect on viewers of Pawtucket's nativity scene and also on any political divisiveness that erection of the creche has caused. The Court will now summarize this testimony.

Plaintiff Donnelly testified that he first saw the Hodgson Park display, including the nativity scene in December, 1980. (I, 8, 10, 20). He stated that he viewed the creche as a religious display depicting the birth of Christ, and that he knew that it was sponsored by the City. (I, 11-14, 29). Perceiving this as a demonstration of official support for a particular religious viewpoint, which ran contrary to his strong belief in the separation of church and state, Mr. Donnelly testified that his reaction was one of fear. (I, 11-13). He explained that he regarded the City's use of the nativity scene as exemplifying an increasing tendency of various religious groups to become more political and thereby to impose their views on the larger society. (I, 11). In response to questioning by the City's attorney, Mr. Donnelly stated that he does not consider Santa Claus and the Christmas tree to be religious symbols because, unlike the nativity scene, they are not referred to or described in religious documents such as the Bible. (I, 28). He further testified that, he did not regard the nativity scene as merely a component of the entire Hodgson Park display. He distinguished it from the other decorations on grounds that the creche "attempted to tell a complete story in itself—the story of the birth of Christ." (I, 28-29).

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[10] Plaintiffs' complaint challenged the allegedly religious nature of some of the music broadcast over this system. No evidence was presented on this issue and the Court regards the point as abandoned.

The other plaintiffs, George Kriebel, Robert Goodwin, and A. Gregory Frazier, have all stated[11] that Pawtucket's nativity scene represents to them a religious display depicting the birth of Christ. Furthermore, they view the City's erection of the creche as demonstrating the City's support for the Christian religion. Finally, these plaintiffs have stated that the City's erection of the nativity scene has offended their interest in the separation of church and state.

Steven Brown, Executive Director of the ACLU,[12] saw the creche twice in December, 1980. (I, 43). Like Mr. Donnelly, he regarded it as a religious symbol which, by its inclusion within the City's display, represented official sponsorship of a particular religious viewpoint. (I, 43-44). He explained that he viewed the nativity scene as a clearly religious symbol despite being surrounded by non-religious figures. (I, 56, 63). Mr. Brown also noted that certain components of the nativity scene, such as the angels, the Madonna, the figures kneeling in adoration, and independent religious significance. (I, 53, 62). Although he agreed that the birth of Christ was a historical fact, he testified that the nativity scene signified to him more than merely historical fact. (I, 63). Mr. Brown was raised and educated in the Jewish faith. (I, 53).

Mr. Brown also testified about public reaction to the ACLU's prosecution of this lawsuit. His impression of this reaction was based on phone calls received by the ACLU at its office, *see, e.g.*, (I, 41), and in response to a three hour call-in "talk show" in which Mr. Brown subsequently participated. It was also derived from Letters to the Editor published in the Providence and Pawtucket newspapers. (I, 49). Mr. Brown stated that some of the callers felt that the ACLU was

[11] These statements were made in affidavits, not in testimony at trial. However, the parties have agreed to accept the statements in these affidavits as evidence in this case.

[12] Mr. Brown testified at length about the ACLU's commitment to civil liberties. The substance of this testimony is not recounted here, because it was relevant only to the issue of standing which the Court has resolved on other grounds.

"making a mountain out of a molehill" and that some regarded the display as secular in nature. (I, 52).[13] However, he felt that most people did not regard the religious element as incidental or minor. (I, 52-53). Rather, his impression was that the issue was not regarded as trivial (I, 61-62), and that many people—perhaps the clear majority—felt that the City had a right to sponsor and support the religious views of the majority. (I, 48-49, 64).

Former Mayor Lynch, testifying about the purpose of the Hodgson Park display in general, stated that community

[13] Mr. Brown was permitted to testify about the contents of these phone calls and to introduce clippings of the Letters to the Editor despite the City's objection. The letters and conversations are hearsay, for they are out of court statements offered to prove that the declarants actually believed or felt about the lawsuit and/or the nativity scene what they stated they did. However, they are admissible under Fed.R.Evid. §803(3) as an exception to the hearsay rule. *See* 4 J. Weinstein, Evidence §803(3)[03]. The declarants' comments in the calls and letters were statements of their then-existing state of mind about the appropriateness of the lawsuit and the City's use of the creche. In accordance with the restriction in §803(3) on use of statements of belief, they may not be considered as evidence that what the declarants believed or felt was indeed so. However, they may be used to show that members of the community believe these things, and these reactions are relevant to the question of divisiveness. *See* text *infra*.

Use of these items as evidence of the *effect* of the City's inclusion of the creche is a somewhat more difficult question, largely because it is not clear what the focus of the "effect" test is in cases where the challenged activity is the use of religious symbols. It seems unlikely that the legally significant effect is a purely subjective one, such that the outcome of the lawsuit depends on which side can produce the most witnesses who will testify about the effect the symbol had on them. On the other hand, symbols do not have meaning in the abstract; their effect *is* the message that they convey to the viewer. Therefore, a court could hardly divine the effect of a symbol without any reference to how people actually perceived it. This Court has concluded that the answer must lie somewhere between these two extremes. It has attempted to assess, in light of the nature of the symbol involved here, the time and manner of its use, and the background of the audience, how most people could reasonably be expected to interpret the message of the symbol and the City's reasons for using it. Because reaction to the nativity scene and the City's use of it *is* the issue, the phone calls and letters that reveal the feelings of some members of the community about the creche and the lawsuit can be used as evidence of effect without violating the restriction in Rule 803(3).

morale was one of the principal reasons for the City's sponsorship of the Christmas display. (II, 76). He likened it to the City's Fourth of July, Memorial Day, and Veterans Day festivities, the other main "cultural and traditional" events that the City sponsors. (II, 83-84). He also emphasized the importance of the Hodgson Park display to the downtown merchants, who rely heavily upon it as a draw for holiday shoppers. (II, 78-82). In furthering this commercial function of the display, Lynch testified, the City works with the downtown merchants' association in planning the size and timing of the display. (II, 78-79, 85-86). The utilization of Hodgson Park in this fashion is part of the downtown redevelopment effort. (II, 84-86).

When asked specificially about the role of the nativity scene, the Mayor initially stated that the creche was "central" to the City's Christmas experience for "three basic reasons": cultural and traditional, aesthetic, and economic. (II, 54-55). Later in his testimony, Mayor Lynch stoutly maintained that the creche was "incidental to" and "not the primary reason" for the overall display. (II, 77, 91). After some initial equivocation when questioned by plaintiffs on the point, (II, 53-54, 63-65), the Mayor responded to defense counsel's inquiry by stating that he would erect the display without the creche if necessary. (II, 76-77). He said that he "would assume and hope" that, even without the nativity scene, the display would still promote morale. (II, 91). The Mayor concluded, however, that "most people" would be "upset" if the City had to remove the nativity scene. (II, 54). Noting that a creche has been displayed as part of Pawtucket's Christmas decorations for at least 40 years, (II, 62, 75), the Mayor stated that he had never received or heard of a complaint about it prior to this lawsuit. (II, 57, 62, 75).[14] Since the lawsuit, he has received over a hundred phone calls and numerous letters. (II, 57).

[14] This testimony must be qualified somewhat by the Mayor's statement, made during the course of an interview with the Good News Paper, that the

It is the Mayor's impression that people were shocked and outraged over the suit because it questioned what had been an accepted community tradition for 40 years. (II, 58, 60, 67-68). In the Mayor's view, people "had made the simple assumption that this would always be there because it was a good thing, and they're outraged again over the questioning of what is good for all." (II, 60). Criticizing the lawsuit for bringing into the community a divisiveness that "had never been seen" before in Pawtucket, (II, 65), the Mayor explained the public reaction by suggesting that people "thought it was very small of anybody to question what had been accepted by the community" for so many years "as a good thing." (II, 67-68).

After the lawsuit was filed, the Mayor held a "press conference" at Hodgson Park. (II, 55). A podium was set up specifically for the event in front of the nativity scene. (I, 117-18; II, 55-56). There had never before been a press conference at the display. (II, 75). The subject of the gathering was this lawsuit. (*Id.*). The Mayor led the crowd of municipal workers and school children in caroling. According to newspaper accounts that were part of the Mayor's file and were introduced into evidence by plaintiffs without objection from the City,[15] the press conference was more in the nature of a rally, with the Mayor talking emotionally about patriotism, freedom and the Pawtucket tradition of a nativity scene, and vowing to fight vigorously the ACLU's attempt to take Christ out of Christmas.

ACLU has requested removal of the creche from the City's display every year since the first year he became Mayor. *See* clipping in Pl. Ex. 12. The Mayor testified that he considered the report of this interview to be "a fine overall job." (II, 66). The Court therefore accepts its substantive accuracy.

[15] Two of the Mayor's files, one filled with press clippings and the other filled with letters of support the Mayor had received, were produced at trial and offered by plaintiffs. Before ruling on their admissibility, the Court sought out defense counsel's position. Counsel responded that he had no objection to their introduction. (II, 71). On ascertaining that newspaper articles were included in the matter admitted, the Court specifically warned defendants that the files would be "in for all purposes" if they did not object. The City's counsel reiterated his acquiescence to admission. (II, 72).

At some point after filing of the suit, the Mayor announced his intention to include a menorah in next year's display. (II, 73). He explained at trial that he regards the menorah as "a very important thing to have as part of" the display, (II, 73), not only as a symbol of Judaism but also as "part of our culture, tradition, and an historical fact." (II, 74). He denied having said at the press conference, as reported, that this addition would be made "in honor of our Jewish brethren who have supported us in this." (II, 73).

The Mayor noted that at least one segment of the Jewish community in Pawtucket has called him to express support and to state that they regard the inclusion of the nativity scene as "a thing of joy and not a religious service or observance of any kind." (II, 76). He stated that he does not know of anyone ever having visited the Christmas display for the purpose of worship. (II, 77-78).

Two Pawtucket businessmen, active in promoting the commercial development of the downtown area, reiterated the Mayor's assessment of the importance of the Hodgson Park display to the Christmas shopping trade. Myron Stoller, a downtown retail merchant, noted that 25% of his annual business is done between Thanksgiving and Christmas and emphasized the importance of promotions such as the Hodgson Park display. (III, 1-7). He thought that the nativity scene added "absolutely nothing" to the impact of the display for commercial purposes. (III, 4, 7). Mr. Stoller, who is Jewish, does not object to the inclusion of the creche and has never heard any complaints about it. (III, 4-5). Dennis Moore, another local businessman and executive director of Downtown Pawtucket Revitalization, Inc., characterized the Hodgson Park display as "a key link in bringing commerce into the City." (III, 12). He agreed that the display's business impact would not be affected by removal of the nativity scene. (III, 14-15).

Each side presented expert testimony on the nature and effect of the nativity scene. Michael Werle, a licensed clinical psychologist about 40% of whose patients are children, (II, 19-24), testified about the important role that symbols play in a child's development of a self-image. (II, 25). He regarded the nativity scene as a very powerful symbol of worship, different from such secularized elements of the display as Santa Claus, Christmas trees and gift-giving. (II, 26-28). He felt that the symbol's impact on a child would be hightened by the magical quality of the display's bright lights and gifts of candy from Santa. In his opinion, a child of a non-Christian family, upon seeing the creche as part of a public display, would wonder whether he and his parents are normal. (II, 27-28, 39). He agreed that such self-doubt would arise only in children who understood the difference between public and private settings. (II, 31, 40-42, 44).[18] Furthermore, Dr. Werle felt that Pawtucket's inclusion of the creche in its Christmas display "reinforced [in Christian adults] an already prevalent attitude in our country that we are a Christian country." (II, 28). Dr. Werle believed that, by "encourag[ing] people who already confuse being American with being Christian," the City's practice breeds religious chauvinism and leads to the view that non-Christians are "somewhat less important and have less merit." (II, 28-29). Finally, he felt that nonbelieving adults would be insulted by the City-sponsored creche, but not "profoundly affected" by it. (II, 29).

Thomas Ramsbey, an ordained United Methodist minister and a college professor with a Ph.D. in the sociology of religion and religious ethics, (II, 93-94), testified as to the religious symbolism of the nativity scene. Dr. Ramsbey noted that, although there is no bright line between religious and non-religious symbols, an approach commonly used in the

[18] Dr. Werle testified that he assumed that Hodgson Park was a public park because of the site of the display and its proximity to City Hall. (II, 48-49).

analysis of symbols defines "sacred" symbols as those which are clearly associated with a particular group. (II, 95-96). By contrast, "profane" (or secularized) symbols are not closely tied to particular groups; rather, they "belong" to everyone. (*Id.*). In contrast to the other elements of the Hodgson Park display, which he does not consider "sacred," (II, 105-06, 108-09), Dr. Ramsbey regards the creche as a very sacred religious symbol of Christianity. (II, 97, 114). He noted that the nativity scene depicts the birth of Christ as recounted in the Gospels of Matthew and Luke. The figures—including the animals—are in a worshipful pose; angels, regarded as messengers from heaven, are present. In his view, "the whole setting of the creche is a statement about the divinity, if you will, or the extraordinariness of the birth of this baby." (II, 98). Tying this to the theory that it is group affiliation which makes a symbol "sacred," Dr. Ramsbey pointed out that this belief about the special nature of Jesus Christ distinguishes Christians from other groups. (II, 114). He explained that the representation of the birth of Christ in the creche is a combination of historical fact and "the faith of the early church." (II, 98).

Dr. Ramsbey stated that the Methodist Church uses the creche as part of its worship and expressed dismay that the City had demeaned this Christian religious symbol by setting it in the midst of other, non-religious symbols. (II, 97, 104, 113).[17] On cross-examination, Dr. Ramsbey agreed that

[17] Dr. Ramsbey was one of ten local clergypersons who, after the Mayor's press conference and the onset of the public furor this lawsuit generated, issued the following statement:

> We clergy of several religious traditions wish to express a pastoral concern growing out of the controversy surrounding the display of a nativity scene with city funds in Pawtucket. Our concerns are several noted below. While the festivities, lights and generation of good will in this season have roots in both religion and secular tradition, the creche is a specifically religious symbol. Our country, while deeply influenced by the Judeo-Christian heritage, is not itself Judeo-Christian but is pluralistic, consisting of many rich religious traditions and recogniz-

Christmas is in part a secular celebration belonging to the whole American culture. He insisted, however, that parts remained deeply religious and associated only with Christianity. (II, 109-12).

Defendants' expert, David Freeman, is a Professor of Philosophy at the University of Rhode Island and has done scholarly work in the fields of religious philosophy and religious symbolism. (III, 15-17). The essence of Dr. Freeman's testimony was that symbols "function contextually." (III, 33). Dr. Freeman testified that symbols have both objective and subjective dimensions. (III, 17-18). He emphasized that a religious symbol "doesn't occur in a vacuum, it occurs in a context." (III, 18). Defining a religious symbol as one that evokes "a religious response, an attitude of worship, of awe, a respect for the holy, a respect for the sacred," (*Id.*), Dr. Freeman stated that whether a symbol evokes a religious response "depends upon the attitude of the person viewing that symbol and where it's found." (III, 18).

In Dr. Freeman's view, the purpose of the creche in the Hodgson Park display is "to help celebrate Christmas." (II, 27). He regards the nativity scene as "essential" in a Christmas display because otherwise "it would be like having a birthday party without knowing whose birthday it was." (III, 22-23).

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ing the value of all. Government in our country, wisely recognizing the diversity of these traditions, was set up to steer clear of embracing any while protecting the religious freedom of all. We as pastors have a responsibility to educate our people in the history of religious strife and the futility of imposing religious beliefs on the human conscience. The specifically religious observance of this holiday period belongs in our homes and in our churches and synagogues. Although there are public recognitions of this glad season, they should be confined to those symbols and traditions which are not identified with any one group. We call upon our public officials not to exploit the strong sentiments associated with religious festivals and divide majority from minority. Rather, we hope they will rise to a statesperson-like position and avoid the insensitivity of foisting upon others any specific religious traditions. In this way, the true joy of the season can be appreciated by and made meaningful to the widest diversity of people.

He likened the significance of Christ's birth to that of George Washington's. (III, 22). Furthermore, Dr. Freeman thought that the creche "put [people] into a Christmas mood where they would, in that context of the scene as it occurs, be more inclined to spend money in shopping." (III, 27). He summarized: "A symbol in a religious context would be a religious symbol and have a religious impact. A symbol in a non-religious context will not be a religious symbol and will not have a religious impact." (III, 27-28). In Professor Freeman's view, a creche displayed in a church "would definitely be making a religious statement." (III, 32). In Hodgson Park, it is merely part of the whole: "[People] are not going there to worship or to pray, they're going there to shop, and the function the display would have for most people at least—the great majority, if not all—would seem to be to participate in the Christmas spirit, brotherhood, peace, and let loose with their money." (III, 19). Personally, Dr. Freeman does not attach any religious significance to the creche; indeed, he finds the Hodgson Park display aesthetically displeasing. He perceives a discord in lumping together Santa Claus, Christmas trees and "something which is obviously still in many peoples' minds of a religious origin." (III, 23).

Of the exhibits introduced by the parties, only three require separate discussion. These are the packet of Letters to the Editor collected by Steven Brown, the file of cards and letters received by former Mayor Lynch in connection with this suit, and the file of newspaper clippings kept by Lynch and containing many of the same Letters to the Editor that appeared in Brown's collection. Approximately 70 letters relating to the creche and/or the lawsuit are included in these exhibits. Only three do not endorse the position taken by the City or, more particularly, by Mayor Lynch, in this case.[18] The letters ex-

[18] Two of these letters encouraged the City to use non-sectarian symbols and expressions in its Christmas display so that the peace and goodwill of the season could be celebrated and shared by all without reference to denominational differences. The third letter questioned the ACLU's sense of proprie-

pressing support vary greatly in style and content, but certain generalizations can be made.

The most recurrent comments appearing in over half the letters are that the birth of Christ is the essence of Christmas, and that the presence of the creche, as a symbol of this spiritual core, is necessary to preserve the true meaning of the holiday. Although about 10% of the letters expressed the view that the nativity scene represented simply the general moral and ethical aspirations of goodwill, peace, and love, the clear majority of writers regarded the dispute over the nativity scene as implicating religious beliefs and values. The Mayor's insistence on preserving the creche was lauded by many as a determination to "keep Christ in Christmas" and, more broadly, to keep God in American life. Several letters decrying the loss of a City "tradition" indicated that their writers viewed the creche's central role as portraying the religious aspect of Christmas. Some writers perceived the lawsuit as a confrontation between believers, whose right to express their faith was being threatened, and nonbelievers. In several letters, the writer expressed abhorrence for "the minority's" attempt to dictate to the "majority" what symbols could be displayed and revered. Some advocated allowing taxpayers or voters to decide how the City should spend their money. A few vigorously contested the desirability or even the possibility, of separating the religious and political spheres.

It would be inappropriate to quote portions of any of these letters because of the difficulty of selecting a truly representative cross-section. After reviewing them, however, the Court is firmly convinced that they evidence a deep concern about and resentment for what most of the correspondents regarded as an attack on a cherished religious symbol. Although many letters criticized the ACLU as "petty," most writers did not mean that the creche was an insignificant part of the display.

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ties in attacking the "innocuous" Hodgson Park display, but even more vehemently chided the Mayor for allegedly exploiting the issue for political gain.

Indeed, the intensity of feelings evident in the letters belies any suggestion that the writers regarded this lawsuit as involving a trivial matter. As Mayor Lynch himself said, "I've never seen people as mad as they are over this issue." (II, 66). The asserted "pettiness" lay in the ACLU's decision to challenge what most regarded as the central symbol of Christmas rather than avoid the Hodgson Park area if the creche offended members of the ACLU. Overall the tenor of the correspondence is that the lawsuit represents an attack on the presence of religion as part of the community's life, an attempt to deny the majority the ability to express publicly its beliefs in a desired and traditionally accepted way. In the Mayor's words, "The people absolutely resent somebody trying to impose another kind of religion on them. . . . I think the denigration, trying to eliminate these kinds of things, is a step towards establishing another religion, non-religion that it may be." (II, 66-67).

I

At the outset, this Court finds that the plaintiffs Kriebel, Goodwin and Frazier have standing to litigate this case. Even before *Flast* v. *Cohen*, 392 U.S. 83 (1968), recognized the standing of federal taxpayers to challenge governmental expenditures on establishment clause grounds, municipal taxpayer standing had been permitted in this area. *See e.g. McCollum* v. *Board of Education*, 333 U.S. 203, 206 (1948), citing *Coleman* v. *Miller*, 307 U.S. 433 (1938). *Cf. Frothingham* v. *Mellon*, 262 U.S. 447, 486-87 (1923) (contrasting stake of federal taxpayer with that of municipal taxpayer for standing purposes). Thus, there is little doubt that Kriebel, Goodwin and Frazier, who pay taxes to Pawtucket, can challenge the City's maintenance of the creche.[19]

[19] These plaintiffs submitted affidavits stating that they are now and have been during the time period relevant to this suit taxpaying residents of Pawtucket. The defendants have agreed that the Court may admit these affidavits into evidence.

II

The Supreme Court, in one of its major Establishment Clause opinions, noted wearily that "cases arising under the [Religion] Clauses have presented some of the most perplexing questions to come before this Court." *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 760 (1973). The difficult problem is to define "the [elusive] line which separates the secular from the sectarian..." *Abington School District* v. *Schempp*, 374 U.S. at 231 (Brennan, J., concurring).

Before applying the familiar three-prong test prescribed by the Supreme Court for analysis of Establishment Clause problems, it is necessary to address two arguments made by the City which call into question whether this case presents an Establishment Clause problem at all.[20] Specifically, the defendants contend first that the erection of the creche has not involved the City in religious activity to any significant degree. They claim that the presence of the creche in the Christmas display merely acknowledges a religious component of an important secular holiday that is celebrated by all Americans. Second, the City also argues that the nativity scene has become largely "secularized" so that its nature or function within the Hodgson Park display is not primarily religious. Each argument is considered in turn.

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[20] At the threshhold, it should be settled that the fact the government activity challenged in this case took place on private property does not foreclose an Establishment Clause inquiry. The City of Pawtucket clearly sponsored the Hodgson Park display. City workers planned it and erected it, Santa Claus arrived on a City fire truck to open it, the Mayor pulled the switch to light it, and the light and sound systems of the nearby City Hall were connected to it. Moreover, every element in the display, including the creche, was purchased and is owned by the City, was assembled and dismantled by City workers, and was lighted at City expense. That the portion of these expenditures attributable to the creche is relatively small does not vitiate any Establishment Clause problems. The use of even the most negligible amount of tax money to promote a religious belief or subsidize a religious activity contravenes the constitutional prohibition. *Stone* v. *Graham*, 449 U.S. 39, 42 n.4 (1980) (per curiam); *Committee for Public Education* v. *Nyquist*, 413 U.S. at 797 n.56.

A. Christmas as a Secular and Religious Holiday

The City argues first that "the dominant purpose and effect of the Christmas display and each component of that display (including the nativity scene) is to celebrate a national holiday in keeping with its *raison d'etre*. . ." (Memo at 8). It continues, "The function of the nativity scene in the celebration of Christmas is really no different from the function of religion in the celebration of Christmas as a national holiday." (*Id.* at 9-10). It reasons, "Since the religious character of [Christmas] does not invalidate its observance because of an independent secular justification, a celebration of that holiday which includes a religious component ought not to constitute an establishment as long as the religious component is placed in its appropriate secular context." (*Id.* at 11). In the Court's view, this reasoning is born of a fundamental misperception of the meaning of the Establishment Clause.

Although no case to the Court's knowledge has specifically considered the legitimacy of designating Christmas as a national holiday, the courts that have considered the propriety of governmental participation in various displays and practices connected with Christmas have recognized the obvious fact that Christmas, as celebrated in 20th century America, has a decidedly secular dimension. *See, e.g., Florey* v. *Sioux Falls School Dist.*, 619 F.2d 1311, 1316 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980); *id.* at 1325 (McMillan, J., dissenting); *Allen* v. *Hickel*, 424 F.2d 944, 948 (D.C. Cir. 1970); *Citizens Concerned for Separation of Church and State* v. *Denver*, C.A. No. 80-DW-1661 (D. Colo. Feb. 20, 1981). This is the Christmas whose central figure is Santa Claus and whose themes are the nontheological ones of goodwill, generosity, peace, and less exaltedly, commercialism. Yet it is equally obvious that for the many 20th century Americans who practice Christianity, there is another Christmas. This is the "original" Christmas whose central figure is Christ, the Son of God, and whose themes are the essentially theological ones of salvation and spiritual peace, renewal, and fulfillment. The City argues

that the emergence of a secular dimension to Christmas has rendered the holiday's meaning merely vestigial.

The Court does not agree.[21] Christmas remains a major spiritual feast day for most sects of Christians. It has not lost its religious significance; rather, it has gained a secular significance. Janus-like, it is one holiday with two distinct and very different faces.

If government can, consistent with the Establishment Clause, declare and celebrate Christmas as a national holiday, it is precisely because of this dichotomous nature—that is, because the religious elements of Christmas can be separated out and the secular elements presented more or less in isolation. This is not an uncommon situation in the Establishment Clause area. Recognizing that religion is a real and pervasive component in American life, the Supreme Court has never held that the presence of a religious element in an activity automatically places it beyond the purview of government involvement. As long as there are also strong secular elements, the government may involve itself with the activity *if* it limits itself to promoting only those elements. For example, although recognizing that "the place of the Bible as an instrument of religion cannot be gainsaid," *Abington School District* v. *Schempp*, 374 U.S. at 224, the Court has held that the Bible possesses an independent literary and anthropological value that makes it a permissible object of study in the public schools in the course of a curriculum designed to emphasize those elements. In an analogous area, the Court has held that sectarian colleges and universities have sufficiently separable elements that government can, with care, structure its pro-

[21] The Court takes judicial notice that its latest figures put the Roman Catholic population in Rhode Island at well above 60%. The total Christian population is undoubtedly higher still. In light of this demographic characteristic of this area, the Court considers the City's assertion to be at best disingenuous. Evidence adduced at trial indicated that Christmas retains a profound religious significance for Christians. Certainly, Christmas has not lost its religious meaning for many of the City's residents who wrote to the Mayor expressing their support for his position.

grams to aid the latter without impermissibly advancing the former. *Tilton* v. *Richardson*, 403 U.S. 672, 680-82 (1971).

In involving itself with one of these activities that possesses a dual significance, government must, however, be exceedingly careful that it indeed acts to advance only the secular elements. A case in point is *Stone* v. *Graham*, 449 U.S. 39 (1980) (*per curiam*). There the Court held that a Kentucky law that required the posting of a copy of the Ten Commandments on the walls of public school classrooms was constitutionally infirm. Although accepting the possibility that the Ten Commandments could have a place in a properly oriented public school curriculum, the Court refused to accept a proffered secular purpose when the state merely posted the Commandments without making any real attempt to distill the secular significance of the Decalogue from its religious elements. Thus, the more dominant and widely recogized the religious element, the more fastidious must the government be in isolating and emphasizing its concern for only the non-religious elements. Indeed, government has an obligation, if it would not contravene the Establishment Clause, to dissect the secular from the religious even in circumstances where private persons and organizations would perceive and treat the two as an amalgam. *See Allen* v. *Morton*, 495 F.2d 65, 73 n.14 (D.C. Cir. 1973) (opinion of Tamm, J.).

Applying these principles to the case of Christmas, it is this Court's view that a high standard of care is demanded of government when it seeks to "celebrate" this holiday. The secular and religious dimensions share a common origin and many people, whose holiday observance includes both aspects, may not perceive them as clearly demarcated. It is too late in Establishment Clause jurisprudence to suggest that the Government may endorse the Christian view of Christmas as a celebration of the birthday of the Son of God. The fact that a majority of citizens may not consciously draw a line between the Christian and the secular dimensions of Christmas requires

that the government be all the more careful to draw a line, and a bright one, between the two, and remain on the clearly secular side.

The City apparently regards this construction of government's permissible role in dealing with an event having both significant secular and religious meaning as artificial and too restrictive. It seeks to avoid it by an argument that reduces in essence to this: (1) the secular dimension of Christmas is sufficiently developed to justify its observance as a national holiday; (2) because the City is permitted to celebrate the holiday, it must be permitted to celebrate all its component parts; (3) Christmas still has some religious component; (4) therefore, the City must be able to include that religious component, via the creche, in its Christmas display as long as it includes the "justifying" secular elements.

In the Court's view, this argument is merely a bootstrap. The City relies on the presence of a secular dimension to give government a toehold and then argues that government, once there on the strength of the secular, has *carte blanche* to enter the allied religious dimension. This argument would permit government to teach the religious message of the Bible because that document also has literary, social and historical value. *Cf. Abington School District* v. *Schempp*, 374 U.S. 203 (1963) (school authorities could not read Bible verses without comment despite the secular value such verses might have). It would permit government to aid the sectarian instructional parts of church-affiliated colleges because those same institutions also teach secular subjects. *Cf. Tilton* v. *Richardson*, 403 U.S. at 682-84 (striking down provision that would have permitted federally-financed buildings to some day be used for religious purposes). It would permit government to declare Sunday a legal day of rest for religious reasons because there are also social welfare reasons for establishing a uniform day of rest. *Cf. McGowan* v. *Maryland*, 366 U.S. 420, 453 (1961) (upholding Maryland Sunday closing law but warning that

there might be a different result if it were shown that the purpose of a given Sunday law "is to use the state's coercive power to aid religion").[22] In the end, it would render the Establishment Clause a mere formula, for it is difficult to imagine any religious activity or object that would not have some saving secular qualities on which government could base its participation. *See McGowan* v. *Maryland*, 366 U.S. at 467 (Frankfurter, J., concurring) (noting that endowment of a church might be defended on theory that church inculcates moral concepts that make people better citizens). The identification of a secular dimension is not a license for government to range throughout the entire field with no thought for the secular or religious character of the area in which it moves.

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[22] The city has relied heavily on *McGowan* v. *Maryland* in its argument. It suggests a "strong similarity between the religious origins of the Christmas holiday and the religious origins of Sunday as a weekly legal day of rest." (Memo at 10). It then construes *McGowan* as meaning that "the religious origin, and benefit to, religion in the Sunday laws did not disqualify their secular content; rather, their dominant secular character made their considerable religious impact incidental." (*Id.* at 11).

The city thus apparently regards *McGowan* as holding that the presence of a strong secular element is sufficient to vitiate any Establishment Clause problems by counteracting even a considerable religious element. The Supreme Court has rejected just such a reading of *McGowan*. Though set out in the course of a discussion of the "effect" strand of the *Lemon* test, the Court's explanation is useful here.

> In [*McGowan*] Sunday Closing Laws were upheld, not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests; instead, approval flowed from the finding, based upon a close examination of the history of such laws, that they had only a remote and incidental effect advantageous to religious institutions. *Committee for Public Education* v. *Nyquist*, 413 U.S. at 783-84 n.39.

McGowan upheld the Sunday Closing laws not because the presence of the secular justified the presence of the religious, but because the Court found the religious no longer present in any appreciable degree as a basis for such laws. *McGowan* is distinguishable from this case because the Court finds that the religious aspects of Christmas and of the creche are not merely a matter of historical origin; rather, the religious elements of both remain vital and significant to this day.

Rather, it is a delimitation of the bounds within which government must remain if it is not to trespass on forbidden ground.

In short, the Court finds that the mere fact that the Christmas holiday has an important secular element does not insulate government involvement in the religious aspects of the holiday from further review under the Establishment Clause.

B. *The Creche as a Religious Symbol*

In contending that it has not violated the Establishment Clause, the City also argues that the inclusion of the creche in the Hodgson Park display is not primarily religious because the nativity scene in essence has become "secularized." As the Court understands this argument, the City is suggesting that most or all of the religious meaning that originally inhered in the nativity scene has been lost over time in the same way that other Christmas symbols, such as Santa Claus, have shed their religious meaning, or become "secularized." This argument requires the Court to examine the symbolism and meaning that attaches to the creche.

The nativity scene owned by the City of Pawtucket is not in any respect extraordinary. It depicts Mary and Joseph with the Christ Child lying in the manger, adoring shepherds, reverential kings bearing gifts, and angels announcing and rejoicing in the birth. Like other nativity scenes, it portrays the story of the birth of Christ as described in the gospels. It attempts to capture, through the poses and facial expressions of the figures, a sense of awe and worship. Although the birth of Christ is a part of history in the sense that a real person named Jesus Christ was born in Judea approximately 1981 years ago, it borders on the frivolous to suggest that the creche is merely a rendering of that historical fact.[23] As Dr. Ramsbey explained,

[23] Although the nativity scene goes beyond a strictly historical representation of the birth of Christ, the creche may be viewed as "historical" in the somewhat more specialized sense that we consider, for example, Greek myths to be historical. Beliefs about the origins of deities, such as the Greek belief

the object we know as a nat[illegible]ene or creche combines history and faith. It not only [illegible]gnizes the fact that a child named Jesus was born, but al[illegible]makes a statement about the extraordinary nature of that child by presenting his birth as attended by angels, revered by shepherds, and sought out by kings.

The City nevertheless argues that the creche has lost much of its religious meaning in the same way that Santa Claus, Christmas trees, stars, bells, and other Christmas symbols have become secular. The Court finds these comparisons unpersuasive. It is generally accepted that the concept of Santa Claus can be traced to St. Nicholas, a bishop of the early Catholic Church. However, as one of plaintiffs' witnesses aptly observed, the modern day Santa Claus owes more to Clement Moore (and, one suspects, to present day television commercials) than to the Fourth Century bishop. Santa Claus of today is a figure endowed with mythic trappings having no conceivable connection to his real-world progenitor—he is a jolly bearded figure who lives at the North Pole and emerges on Christmas Eve in a flying sleigh pulled by eight reindeer to distribute toys manufactured by elves by climbing down chimneys. No such drastic mutation can be found in the case of the nativity scene. The modern day creche retains its faithfulness to the biblical accounts which first inspired renderings of what Christins believe took place at Christ's birth.

As for other Christmas symbols—stars, (whose use presumably originated as a reference to the Star of Bethlehem), bells, (presumably a reference to church bells), and the Christmas tree, (whose pagan origins make its Christian significance especially murky)—it must be recognized that these are dif-

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that Athena, goddess of wisdom, sprang full-grown from the head of Zeus, are part of the history of a people. However, the Court does not understand the City to be using "historical" in this particular sense when it argues that the creche has an historical meaning because it is based on the historical fact that Jesus Christ was born.

ferent kinds of symbols than the creche. To discern a religious import in the use of such common objects as stars, bells and trees, one must be able to associate them with the object or event that is of primary religious significance. The viewer must be able to recognize that the star represents the Star of Bethlehem which, according to the Bible, appeared on the night of Christ's birth and shone over the stable in which he lay; or that the bell represents the church bells that peal out on Christmas morning to call the faithful to worship; or that the lights on an evergreen tree represent the spiritual and everlasting light that Christianity believes Christ brought to a world in darkness. It may well be that, in view of the secular dimension that the celebration of Christmas has attained in modern life, most people no longer do, or even can, make the associations necessary to give these symbols a religious meaning.

However, unlike stars, or bells, or trees, the creche is not a common, ordinary object that attains a religious dimension only if the viewer understands that it is intended to connote something more than its facial significance, and possesses the key to unlock that secondary meaning. The creche is more immediately connected to the religious import of Christmas because it is a direct representation of the full Biblical account of the birth of Christ. That collection of figures does not have an everyday meaning that must be transcended to reach the religious meaning. For anyone with the most rudimentary knowledge of the religious beliefs and history of Western civilizations, the religious message of the creche is immediately and unenigmatically conveyed.

In sum, the Court does not understand what meaning the creche, as a symbol, can have other than a religious meaning. It depicts the birth of Christ in a way that is not merely historical. It has not been so altered over the years as to relegate its religious connection to a matter of historical curiosity. It is the embodiment of the Christian view of the

birth and nature of Christ. Unless that view has itself lost its religious significance, an artifact that portrays that view simply and unambiguously cannot be other than religious. The City suggests that the creche represents the nonsectarian ethical aspirations of peace and goodwill. Even assuming that this is an independent, secular meaning, the Court finds that it is subordinate to, and indeed flows from, the fundamentally religious significance of the creche.[24]

The Court does not consider Dr. Freeman's testimony to undermine the conclusion that the creche is indeed a religious symbol for purposes of the Establishment Clause. Dr. Freeman appeared to regard the ability to evoke a response of worship as critical to a religious symbol. His view of symbols was primarily a functional one. If the symbol or artifact elicited a worshipful response in those who viewed it, it was "religious"; if that same symbol, in a different setting, did not prompt viewers to worship, it was not "religious" in that setting. Thus, Dr. Freeman regarded the creche as a religious symbol in a church, but maintained that it was not a religious symbol in the Hodgson Park display because it would not induce viewers to engage in worship. While the Court does not question that

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[24] Justice Frankfurter, concurring in *McGowan* v. *Maryland*, emphasized:

> If the primary end achieved by [the government action] is the affiliation or promotion of religious doctrine—primary, in the sense that *all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion*—the [action] is beyond the power of the state. 366 U.S. at 466 (concurring opinion) (emphasis added).

The Court accepts that the desire for peace and goodwill is not essentially religious. However, it is one thing to convey that desire by a banner that reads simply "Peace on Earth" or "Season's Greetings", and another to convey it by a representation of the birth of Christ. The relationship of the latter to peace and goodwill is grounded in, and cannot be isolated from, religious belief about what the birth of this child means to the world. The only way the creche can advance peace and goodwill is if viewers are led to believe in and practice what Christ taught. *Cf. Abington School District* v. *Schempp*, 374 U.S. at 231 (Brennan, J., concurring) (government may not use essentially religious means to serve governmental ends where secular means would suffice).

this may be a valid approach in the context of a sociological or anthropological study of symbols, the Court believes that this mode of definition is too restrictive for purposes of First Amendment analysis. *Cf. Crowley* v. *Smithsonian Institution*, 636 F.2d 738, 742 (D.C. Cir. 1980) (court disagrees with expert's definition of "religion" in Establishment Clause inquiry).

"Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 632 (1943). One may understand the symbol's message—so that the symbol has performed its job of communicating—without agreeing with it or responding to it. So long as the viewer possesses the background knowledge necessary to comprehend what the symbol is meant to stand for, the symbol does not lose its power as a communicative device simply by being taken out of its original, or optimal, context. The American flag flying on top of the Capitol represents our country; that meaning does not disappear for people when the flag is displayed in a baseball stadium or even in a museum exhibit of flags of the world. Similarly, for anyone familiar with modern history, the swastika represents nazism whether it appears on the armband of a World War II German uniform or is scrawled by vandals in 1981 on the side of an American building. The fact that the viewer may not feel a patriotic response on seeing the American flag or be moved to practice the tenets of nazism on seeing the swastika does not mean that he has not understood the message these symbols convey. By the same token, the creche does not lose its power to make a theological statement simply because it is removed from a Christian church, nor is it any less a religious symbol because it does not necessarily invoke a response of worship.

III

The findings that the Christmas holiday has a significant religious aspect and that the creche is a religious symbol does not, of course, resolve the constitutional question. Government may involve itself in activities with a religious content as long as it does so carefully, in ways that avoid the harm that the Establishment Clause was intended to forestall. The Supreme Court has not yet given plenary consideration to a case challenging the use of religious symbolism. Perhaps the closest it has come is the recent case of *Stone* v. *Graham*, 449 U.S. 39 (1980) (*per curiam*), in which the placard of the Ten Commandments posted in Kentucky's public classrooms had some aspects of a religious symbol. Cases involving state aid to religiously-affiliated schools and religious exercises within public schools, although not very helpful on their facts, do provide the basic method of analysis. To pass muster under the Establishment Clause, a statute must have a secular legislative purpose, its principal or primary effect must neither advance nor inhibit religion, and the statute must not foster an excessive government entanglement with religion. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971). Recognizing that these factors are only guidelines to assist in ascertaining when the objectives of the First Amendment have been impaired, *Meek* v. *Pittinger*, 421 U.S. 349, 359 (1975); *Tilton* v. *Richardson*, 403 U.S. at 678, this Court must look to the purpose and effect of the City's inclusion of the creche in its Christmas display, and to whether this practice breeds administrative entanglement or political divisiveness.

A. Purpose

The fundamental of the purpose test are easily stated. The government action must "reflect a clearly secular . . . purpose." *Committee for Public Education* v. *Nyquist*, 413 U.S. at 773. While the rationale offered by the governmental entity is entitled to deference, *Lemon* v. *Kurtzman*, 403 U.S. at 613, the Court must closely scrutinize the stated purpose, *McGowan* v.

Maryland, 366 U.S. at 449, and ensure that the action was indeed motivated by legitimate secular aims. *E.g.*, *Stone* v. *Graham*, 449 U.S. at 41; *Hunt* v. *McNair*, 413 U.S. 734, 741 (1973) (recognizing that "a legislature's declaration of purpose may not always be a fair guide to its true intent," but noting that the plaintiff had not suggested that the purpose was other than stated).

In addressing the purpose test, the City first argues that the nativity scene has no purpose that can be considered apart from the purpose of the Hodgson Park display as a whole.[25] It asserts that "[i]n applying the tripartite test to a government activity which contains a religious element, the appropriate focus is not on the religious element but on the activity of which it is a part." (Memo at 17-18). In the Court's view, this overstates the role that the context in which the religious component appears plays in the search for purpose. Surely, a court should look to the rationale underlying the entire program or activity of which the religious element is a part in order better to ascertain the reasons for inclusion of the religious element. The nature and relationship of the nonreligious components may go a long way toward verifying the purported secular purpose. *E.g.*, *Walz* v. *Commissioner*, 397 U.S. 664, 672-73 (1970) (in considering purpose of a tax exemption for churches, Court found evidence of secular purpose in fact that the charitable exemption included a broad range of educational, ideological, and service organizations). *See also id.* at 696-97

[25] The City argues that, in this case, "there is no significant difference between the first two parts of the [*Lemon*] test—purpose and effect. Whatever function the Hodgson Park Christmas display and its nativity scene component serve, is the function it is intended to serve." The City cites no authority in support of its proposition that the purpose and effect tests should be collapsed into one.

Effect is indeed an indicia of purpose. *See, e.g.*, *Stone* v. *Graham*, 449 U.S. at 42 (analyzing purpose in light of probable effect of State's action). However, as the Court understands the law, the two must be inquired into separately, for a neutral effect will not save an action with an impermissible purpose.

(Harlan, J., concurring). Thus, if a 16th century Italian hand-carved nativity scene is included in a City-sponsored museum display of Renaissance objets d'art, the context lends credence to an assertion that the purpose of including the creche was a secular one.

Recognizing this admittedly important role of context is not the equivalent, however, of suggesting that the only relevant purpose is that of the overall activity or program of which the religious element is a part. *See Valente* v. *Larson*, 637 F.2d 562, 567-68 (8th Cir. 1981), *prob. juris. noted*, 49 U.S.L.W. 3893 (June 1, 1981). Whenever the government employs a religious object or involves itself with a religious practice, the Establishment Clause demands that it account for its reasons in stepping beyond the secular sphere to accomplish its goals. *Cf. Abington School District* v. *Schempp*, 374 U.S. at 231 (Brennan, J., concurring) (government may not use religious means to accomplish its ends where secular means would suffice). Those reasons may indeed be the same as its reasons for employing secular objects or engaging in secular practices—as in the museum example above—but they must nevertheless be ascertained and scrutinized. The government cannot insulate its motives for using an object with religious significance from scrutiny merely by commingling it with a plethora of nonreligious objects.[28] "Indeed, on any other view, the con-

[28] Although the point has not been expressly articulated in the cases, it has often tacitly been recognized. For example, the fact that school officials set out numerous rules governing the teaching of academic subject matter and the conduct of the school day does not limit the court, in a challenge to required prayers or Bible reading, to an inquiry into the general purposes of a prescribed curriculum or organized opening exercises. *See Abington School District* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962). *See also Stone* v. *Graham*, 449 U.S. at 41-42. Similarly, a State that includes a prayer in an official publication cannot by placing it among several nonreligious items, limit the court's scrutiny to the purpose of the publication as a whole. *See Hall* v. *Bradshaw*, 630 F.2d 1018 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3643 (Mar. 2, 1981) (prayer, scenic photos, and message from governor on reverse side of official highway map). *See also Allen* v. *Morton*, 495 F.2d 65, 68-69 (D.C. Cir. 1973) (opinion of Tamm, J.) (looking both to purpose of Christmas Pageant of Peace as a whole and reason for inclusion of creche).

stitutional prohibition could always be brought to naught by adding a modicum of the secular." *Everson* v. *Board of Education*, 330 U.S. at 47 (Rutledge, J., dissenting).

Although the purpose of the Hodgson Park display as a whole is relevant to the constitutional inquiry, the City may not gloss over the fact that the creche occupies a unique position in the display. Unlike every other element, the nativity scene "appears neither to have been divorced from [its] religious origins not deprived of [its] centrally religious character by the passage of time." *Abington School District* v. *Schempp*, 374 U.S. at 278 (Brennan, J., concurring). *See McGowan* v. *Maryland*, 366 U.S. at 431 (using similar standard to evaluate Sunday Closing law). Accordingly, it is necessary to establish why this religious symbol was included with all the secular symbols of Christmas.[27]

In his testimony, Mayor Lynch stated that the purposes for including the creche, like the purposes for the display as a whole, were both economic and cultural or traditional. (II, 54-55).[28] The first reason can be readily disposed of. The

[27] The City points to testimony that the display would still be erected and would still serve at least its commercial and morale functions even without the creche and argues that this "can only mean that the nativity scene is not a primary purpose or effect of the display". (Memo, at 25). For the reasons given in the text, this argument is misdirected. The question is not whether the display is erected primarily for the purpose of featuring the creche (although this would be relevant if it were indeed so), but rather whether the City's purpose in including the creche as part of the display was a clearly secular one. The Court readily accepts that the City had several purposes in maintaining a Christmas display. That some of these purposes can be served as well without the creche merely proves that they were not the reasons why the creche was included in the first place.

The Court also notes that the City has understated the perceived importance of the creche as part of the City's Christmas decorations. At trial, the Mayor manifested a dogged determination to include the creche somehow, *see, e.g.* (II, 54). Such intense determination is not normally provoked by something perceived as a minor or incidental matter.

[28] The Mayor also suggested that the creche was included in the display for aesthetic reasons. It seems unlikely that the creche, which by all accounts is

businessmen who testified on behalf of the downtown merchants readily agreed that the creche contributed nothing to the value of the display as a commercial draw. *Cf. Lowe* v. *Eugene*, 254 Ore. 518, 543, 463 P.2d 360 (1969) (cross erected in part to "enhance the commercial exploitation of the principal Christian holidays").

This leaves the purpose of "culture and tradition." The City argues that the presence of the creche in the display merely acknowledges the religious heritage of the holiday. (Memo at 15, 20). The City characterizes the creche as "part of the cultural symbolism of Christmas" and asserts that its inclusion in the display is simply "a straightforward recognition of a religious tradition." (*Id.* at 26).

The Court is aware that at least two courts, with little hesitation, have accepted as a valid purpose for the inclusion of a nativity scene in a public Christmas display the intention to "show how the American people celebrate the holiday season surrounding Christmas." *Allen* v. *Hickel*, 424 F.2d 944, 949 (D.C. Cir. 1970); *Citizens Concerned For Separation of Church and State* v. *Denver*, C.A. No. 80-DW-1661 (D. Colo. Feb. 20, 1981). With due respect for the learned judges involved in those decisions, this Court finds that rationale extremely troubling, both in the way it places an apparently neutral, secular characterization on something that may well be far more religious than the label implies, and in the ease with which such a justification can be asserted by the sponsoring government.

Particularly when a belief or practice has been common to the majority for a long time, it becomes easy to regard the belief or practice as a matter of culture or tradition and thereby imply that they have somehow attained a neutral, objective status. "Culture," "religion," "history," "heritage,"

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not even well maintained, was erected principally for aesthetic purposes. The City does not press the point. In any case, the Court finds for reasons stated in the text that the City has sponsored the creche for reasons that are principally religious.

and "tradition" are not mutually exclusive categories. The values, beliefs, and practices of groups in our society over time become our culture and traditions. However, the fact that a belief is held by sufficient members of society to render it part of our culture as a whole, or that a practice is observed for a sufficient length of time to give it the status of one of our traditions does not mean that the belief or practice ceases to be religious or to be identified with one group. Recitation of the Lord's Prayer has been a practice of many, if not most, Americans for generations. However, even though its time-honored and widespread observance may make it a tradition, and indeed even an element of our culture, it remains essentially religious and Christian. We cannot permit the labels "cultural" or "traditional," even when validly applied, to blind us to the nature of the object so described.

The Court perceives this danger in characterizing publicly sponsored Christmas displays containing nativity scenes as mere depictions of how the "American people" celebrate the holiday. Santa Claus and Christmas trees have outgrown their religious beginnings and today are part of a nontheological ethos that can perhaps accurately be described as the "American" celebration of Christmas. In contrast, the nativity scene remains firmly tied to its religious origins and continues to express a fundamentally theological message about the nature of the child whose birth is there depicted. It represents the way *Christians* celebrate Christmas. Even though the majority of people in our country may be Christian and Christian beliefs and practices by their very pervasiveness have become an important part of our culture and tradition, it must be acknowledged that not evey American is a Christian.

The Court is not suggesting that government may never take cognizance of a cultural or traditional element that is religious in character. It *is* suggesting that, in considering the constitutionality of government displays that include a nativity scene, we must at least be frank in recognizing that that part of the

display represents "culture" and "tradition" only in the sense that it represents a religious belief held by a substantial segment of our society for a long period of time.

The City effectively concedes that the role of the creche in the Hodgson Park display is to evoke the religious aspect of Christmas. It states that the function of the creche is "really no different than the function of religion in the celebration of Christmas," and characterizes it as representing the "religious heritage" or "religious tradition"[20] of the holiday. It contends, however, that it is merely acknowledging the presence of the religious element, rather than promoting it.

The line between "acknowledgement" and "promotion" is a fine one, especially when the religious beliefs or practices that the government would acknowledge are those held by the majority of its citizens. Moreover, although the Supreme Court has made it clear that the Establishment Clause does not require the government to ignore the existence of religion in American life, it is equally clear that there are limits on the ability of government affirmatively to employ religious practices and objects to acknowledge religion's role. The opening of the school day with a prayer is forbidden even when the prayer is "based on our spiritual heritage," *Engel* v. *Vitale*, 370 U.S. at 425, and even though the practice might readily be explained as a "recognition" that many people and organizations traditionally begin their day with an invocation. Similarly, the government may not "acknowledge" the fact that the Bible is part of our religious heritage and has traditionally been regarded as inspirational by large portions of our society by reading verses, even without comment, in public schools. *Abington School District* v. *Schempp*, 374 U.S. at 224. Most recently, the Supreme Court has held that a state may not acknowledge the Ten Commandments as "the fundamental

[20] To the extent that the City uses "heritage" and "tradition" to suggest that the place of religion in Christmas is limited to an historical remnant with no real current vitality, the Court has already rejected that view.

legal code of Western Civilization and the Common Law of the United States," by requiring the posting of a copy of the Decalogue in each public school classroom in the state. *Stone* v. *Graham*, 449 U.S. at 41.

If the City can display the symbol that epitomizes the religious meaning of Christmas in recognition of Christians' belief that it is the day on which the Son of God was born, may it also sponsor a Catholic Mass in Hodgson Park on Christmas Eve in order to "acknowledge" that Midnight Mass is a part of our religious heritage and one of the traditional ways in which many Americans celebrate Christmas? *Cf. Gilfillan* v. *Philadelphia*, 637 F.2d 924, 930 (3d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3864 (May 18, 1981) (construction of platform for Papal Mass). By posing such a question the Court does not mean to imply that this is an area in which one can paint with a broad brush. The making of fine distinctions is, for better or worse, the essence of Establishment Clause analysis. *Walz* v. *Commissioner*, 397 U.S. at 679. It does suggest, however, that considerable problems arise whenever government purports to "acknowledge" a religious practice or belief, particularly one to which the majority adheres, by the public presentation of sacred symbols, objects, or practices outside of such neutralizing contexts as museum displays, comparative religion or culture courses, and the like.

After careful consideration of the circumstances of this case, the Court concludes that it need not define the precise limits of Pawtucket's power to use a religious symbol to acknowledge the existence of religious beliefs or traditions because it finds that the purpose of including a nativity scene in the Hodgson Park display was not merely the neutral recognition that Christmas possesses a religious significance for some people. Rather, Pawtucket's use of a patently religious symbol raises an inference that the City approved and intended to promote the theological message that the symbol conveys. In the Court's view, nothing in the record undermines the reason-

ableness of drawing that inference here. Indeed, several statements and actions of the City and the Mayor support it.

First, the City has never attempted to disclaim, by means of a written notice or otherwise, any endorsement of the religious message that a creche—particularly when included as part of a Christmas display during the Christmas season—conveys. *Cf. Allen* v. *Morton*, 333 F.Supp. 1088, 1095 n.5 (D.D.C. 1971) (government disavowed any affiliation with the religious content of creche in pamphlets and signs). Although this Court is not suggesting that such a disclaimer would necessarily cure any Establishment Clause problem, *see Stone* v. *Graham*, 449 U.S. at 41, the City's failure to attempt to counter the reasonable inference of endorsement of Christian beliefs created by its ownership and display of the creche is evidence of its purpose.

Second, the only religious heritage and traditions that have been part of Pawtucket's official ceremonies and displays are those of the Christian majority of its citizenry. If the City's goal in "acknowledging" the religious heritage of Christmas is to enhance the viewer's knowledge of American life and culture, it is proceeding in a rather peculiar way when it exhibits only those elements with which most viewers are already familiar through their own experience. The Court is not proposing that the City create "an immense bulletin board whereon symbols of all faiths could be thumbtacked or otherwise displayed," *Fox* v. *Los Angeles*, 150 Cal. Rptr. 867, 587 P.2d 663, 665 (Cal. S.C. 1978). However, if the majority's religious heritage and customs are the only ones that, in the end, are "acknowledged," the asserted neutral pupose is cast into some doubt.

Third, arguments that the City makes in defense of use of the creche also give an insight into the reasons for its presence in the Hodgson Park display. The City argues, "If government could celebrate a national holiday only be removing all of its religious elements, the Establishment Clause would have

achieved the very hostility toward religion which the Supreme Court has long and consistently disavowed as inimical to our constitutional tradition." (Memo at 26). It is hard to see how limiting the City's celebration of Christmas to the secular aspect permits its designation as a national holiday in the first place is hostile to religion—unless by "hostility" the City means that a lavish celebration of the holiday which does not include some reference to Christ will aggrandize the secular dimension of Christmas to the detriment of the churches and religious groups who are struggling to "keep Christ in Christmas." A leitmotif in this litigation and the controversy surrounding it has been the assertion that to remove the creche from the Christmas display is to remove the guest of honor from his own birthday party. *See, e.g.* (II, 22-23) (testimony of Dr. Freeman); Mayor's interview with the Good News Paper in Pl. Ex. 12. This assertion, of course, is quite true when one is speaking of the Christian view of Christmas. However, it is not true when speaking of the secular aspect in which non-Christians participate and which government may observe as a national holiday.[30] Although Christians may deplore the growth of the secular dimension and deem it vital to retain the spiritual essence of Christmas as a religious observance of the birth of the Son of God, government may not assist in the fight to keep Christ in Christmas. To do so is to endorse a religious belief and aid in the promulgation of that belief.

The Court concludes that Pawtucket has tried to endorse and promulgate beliefs by including a nativity scene in its display. The City argues that "as part of the cultural symbolism of Christmas, the nativity scene does have a legitimate

[30] The Court does not accept the suggestion that celebrating Christmas as the birth of Christ is no different from celebrating Presidents' Day as the birthday of Washington or Lincoln. Although Christ had an historical existence just as Washington or Lincoln did, his birth is marked because of his status as a religious leader, not a political one. Only by casting aside common sense and common experience can it be suggested that, in a country with a substantially Christian population, Christ is no different from George Washington.

place which can be disparaged only in the course of an aggressive attack on all religious symbolism which in effect would amount to an establishment of irreligion. . . ." (Memo at 26). Although couching its position in terms of culture and tradition—a characterization which, as noted earlier, may not be permitted to conceal the fact that any cultural or traditional significance the creche possesses stems from its time-honored but not time-diminished place in the religious beliefs and practices of the Christian majority—the City, like most of its residents and neighbors who voiced their views of this lawsuit, regards the issue as whether Pawtucket will be forced to align itself with those who promote the secular, "irreligious" aspect of Christmas by deleting reference to Christ in its Christmas celebrations. This is the import of the Mayor's press conference to fight all the way a perceived attempt to take Christ out of Christmas. It is also the import of his statements, in the Good News Paper interview and on the stand, (II, 67), that attempts to eliminate the creche are attempts to establish a "non-religion." If the City indeed regarded the role of the nativity scene in the display as a neutral recognition of a cultural phenomenon devoid of any significant quantum of religious meaning or any endorsement of a religious message, it would not consider deletion of the creche a blow to religion. *Cf. Abington School District* v. *Schempp*, 374 U.S. at 224 (provision for alternative use of Catholic version of Bible is evidence that State did not regard readings as "nonreligious moral inspiration" or secular teaching tool).

In the Court's view, the City has accepted and implemented the view of its predominantly Christian citizens that it is a "good thing" to have a creche in a Christmas display, *see* (II, 60, 67-68) (Mayor's testimony), because it is a good thing to "keep Christ in Christmas." Irrespective of all the excellent religious reasons that may lead private individuals and organizations and religious institutions to embark on such a crusade, there is no independent secular justification for gov-

ernment's doing so.[31] The Court concludes that the inclusion of the creche in the Hodgson Park display was not prompted by the "clearly secular purpose" that the *Lemon* test requires. Rather, the nativity scene was made part of the display in order to express the City's approval and endorsement of the religious message that the symbol conveys.

B. *Effect*

To pass Establishment Clause scrutiny, the governmental action must have "a primary effect that neither advances nor inhibits religion." *Committee for Public Education* v. *Nyquist*, 413 U.S. at 773. The Supreme Court has recognized that governmental actions may have more than one primary effect. *Id.* at 783-84 n.39. Although governmental activity that confers "some benefit" on religion is not necessarily unconstitutional, *Tilton* v. *Richardson*, 403 U.S. at 679, the existence of "some legitimate end under the State's police power" does not necessarily validate such activity. *Committee for Public Education* v. *Nyquist*, 413 U.S. at 783-84 n.39. Thus, action having the "direct and immediate effect of advancing religion" violates the First Amendment even though it may immediately and effectively promote legitimate secular ends. *Id. See Grendel's Den, Inc.* v. *Goodwin*, No. 80-1653 (1st Cir. July 28, 1981) (rehearing en banc) slip op. at 4-5.

The Supreme Court has stated that the Establishment Clause reaches not only the actual establishment of religion, but also the "*sponsorship*, financial support, and active involvement of the sovereign in religious activity." *Committee*

[31] This is not a case where government's action merely coincides with the tenets of a particular religion. *See Harris* v. *McRae*, 448 U.S. 297, 319 (1980); *McGowan* v. *Maryland*, 366 U.S. at 442. The conviction that abortion is wrong or that a legally-mandated day of rest is desirable may exist entirely apart from any particular religious belief. The conviction that an object representing the biblical account of the birth of Christ will foster goodwill, peace, and brotherhood is born of, not merely coincident to, Christian beliefs. *See* note 24 *supra*.

for Public Education v. *Nyquist*, 413 U.S. at 772, *quoting* *Walz* v. *Commissioner*, 397 U.S. at 668 (emphasis added). The government need not overtly support particular sects or rites of worship. If government is " 'utilizing the prestige, power, and influence' of a public institution to bring religion into the lives of citizens," *Walz* v. *Commissioner*, 397 U.S. at 696 (concurring opinion, Harlan, J.) (quoting, in part, Justice Goldberg's concurrence in *Schempp*), the Establishment Clause is violated. Government must be neutral not only in its relations with different sects, but also in its relations with believers and nonbelievers. *Epperson* v. *Arkansas*, 393 U.S. at 104. *See* *McCollum* v. *Board of Education*, 333 U.S. at 210 & n.6; *Everson* v. *Board of Education*, 330 U.S. at 15-16.

In order for governmental action to pass muster under the Establishment Clause, the government must dispel even the *appearance* of affiliation with the religious message, *Roemer* v. *Maryland Public Works Board*, 426 U.S. at 747-48; *see generally* Tribe, *American Constitutional Law* §14-9 at 844-45 (1978), for apparent sponsorship is as likely as intentional endorsement to breed religious chauvinism in those whose beliefs are seemingly favored as "good" or "true," and alienate those whose beliefs are seemingly dismissed as unworthy of official attention. For example, in both *Stone* v. *Graham* and *Abington School District* v. *Schempp*, the Supreme Court found that governmental action produced the effect of an official alignment with, and promotion of, a religious message even though neither case involved an affirmative attempt to use the religious items to proselytize. *See* 449 U.S. at 41-42; 374 U.S. at 223-24. The intense and widely recognized religious element in the Ten Commandments (*Stone*) and the Bible (*Schempp*) required countervailing measures even stronger than Kentucky's written statement of secular purpose or Abington's presentation of biblical readings without comment or any other element of a religious service.[32] Similarly, in a recent

[32] In *Anderson* v. *Salt Lake City*, 475 F.2d 29 (1973), the Tenth Circuit upheld the placement on public ground of a monument containing the Ten

lower court opinion, North Carolina's inclusion of a "Motorist's Prayer" among the various items on the back of its highway map was sufficient without more to effect an advancement of religion through the appearance of official endorsement of the prayer's content. *Hall* v. *Bradshaw*, 630 F.2d at 1020-21. Furthermore, Philadelphia's construction of a platform adorned with a cross for Pope John Paul's celebration of mass created the appearance of a municipal imprimatur on the religious message of the Papal Mass. This action violated the Establishment Clause even though city officials took no part in the papal rite or in the preliminaries of dispatching invitations and policing seating arrangements. *Gilfillan* v. *Philadelphia*, 637 F.2d at 931.

These latter cases recognize that government sponsorship of religious beliefs can occur in ways far more subtle than endowing state churches or mandating acceptance of certain religious rites or tenets. It can take the form of "passive" use of objects or symbols that people perceive as having significant religious meaning in a manner that does not successfully shift the public perception to the object's nonreligious elements. Moreover, it is misleading to use the term "passive," for this suggests that governmental actions cannot shape public values

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Commandments, the Star of David, and other symbols. The precedential value of *Anderson* is, however, questionable.

First *Stone* v. *Graham* casts doubt on the conclusion that the Decalogue is no longer primarily religious in character. Second *Anderson* was decided three months prior to *Committee for Public Education* v. *Nyquist*, which held that governmental activity passes muster under the Establishment Clause only if its religious effect is "remote and incidental", regardless of its secular effects. The *Anderson* court found that the monument had both secular and religious effects, 475 F.2d at 34, and seems to have permitted the latter on the strength of the former. Such an approach appears inconsistent with *Nyquist*. *See* note 22 *supra*. Finally, the *Anderson* decision rested in part on the fact that the monument involved "no compulsion". 475 F.2d at 34. However, the Supreme Court cases demonstrate that the absence of compulsion is not material in Establishment Clause inquiry.

and perceptions unless the government announces overtly its intention to make a value judgment. The very fact that it employs a religious symbol represents an active and deliberate incursion by government into the sphere of religion. If the effect of this endorsement is to be avoided, government must not merely be silent about the symbol. Rather, government must take affirmative steps to demonstrate that it has not chosen the symbol because it approves what the symbol represents.

The effect of Pawtucket's nativity scene must be analyzed in light of these general principles. This Court has discussed its reasons for concluding that the creche has not lost its religious significance and that it continues to make a strong and essentially theological statement about the nature of Christ. In light of this finding, the question is whether, irrespective of the City's purpose, the effect of Pawtucket's "passive" display of a nativity scene as part of its lavish Christmas decorations is the appearance of an official imprimatur on the religious message of the creche and on Christian beliefs, thereby aiding the Christian religion and violating the City's constitutional duty to maintain a neutral position *vis a vis* Christians, non-Christians, and non-believers.

The City suggests that such an effect has not occurred because: 1) prior to this lawsuit, people did not know of the City's connection to the Hodgson Park display; 2) the creche represents only a minor and insignificant part of the display; and 3) the creche is only one part of a display consisting primarily of secular Christmas symbols, and the City has made no affirmative attempt to highlight or exploit its religious message. In such circumstances, the City argues, the effect is merely to "acknowledge" the religious heritage and traditions of Christmas without signalling any endorsement of the underlying beliefs. These arguments will be considered in order.[33]

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[33] This Court's emphasis on the City's arguments expressed no opinion as to who carries the burden of proof on the question of effect. *Compare Allen* v.

The City's suggestion that, prior to this lawsuit, people did not associate the Hodgson Park display with the City borders on the frivolous. The Director of Parks and Recreation testified that the opening ceremonies at the Park are conducted by the Mayor, officiating in conjunction with Santa Claus, who arrives on a City firetruck. When the main switch is thrown, the lights at City Hall are illuminated simultaneously with those in Hodgson Park. The same music is broadcast at both places by a common sound system. Even though these factors[34] may not reveal to onlookers the precise financial arrangements underlying the display,[35] they surely indicate that the City has some significant part in its erection. The Court thus finds that people knew that the Hodgson Park display, including the nativity scene, was sponsored at least in part by the City long before the plaintiffs came on the scene.[36]

The City's second argument stresses that the creche occupies only a small portion of the groundspace in the Park, requires only a modicum of setup time, and represents only a minor percentage of the total cost and present value of the display.

Morton, 495 F.2d at 88 (opinion of Leventhal, J.,) *with id.* at 73 n.14 (opinion of Tamm, J.). Rather, these arguments simply present, in a concise fashion, the major elements of the "effect" issue in this case.

[34] City officials testified that City workers put in approximately 600 hours assembling and dismantling the display. (I, 67). One can assume that such a flurry of activity in the heart of the downtown area would be observed by the public. However, the Court could find nothing in the record to indicate whether these workers wear uniforms that identify them as City workers.

[35] To support its argument the City points to Dr. Werle's "false assumption" that Hodgson Park was public property. In the Court's view, the fact that people might reasonably mistake the park for public property hardly supports the City's position. As long as governmental involvement sufficient to trigger the Establishment Clause exists, the fact that the public may think the display sits on public property only enhances the possible appearance of official endorsement. In short, what people *believe* the government is doing is the concern of the "effect" analysis in this type of case.

[36] After the lawsuit was filed, the Mayor clearly revealed the City's affiliation with the display and, particularly, with the creche by his press conference/rally and other public comments. Thus, the extent of the City's sponsorship became well established during the time the 1980 display was up and will, of course, be common knowledge for future displays.

The City asserts that the nativity scene is thus a very minor part of the display. In the Court's view, however, the reasons offered by the City are unpersuasive because in ascertaining effect the Court must gauge how those who view the Hodgson Park display perceive it. First, visitors to the display could not possibly know the relative cost, value, or setup requirements of the various components. Second, carefully studying the photographs introduced into evidence and taking a view of the site, the Court concludes that, despite the small amount of ground covered by the creche, viewers would not regard the creche as an insignificant part of the display. It is an almost life sized[37] tableau marked off by a white picket fence. Furthermore, its location lends the creche significance. The creche faces the Roosevelt Avenue bus stops and access stairs where the bulk of the display is placed. Moreover, the creche is near two of the most enticing parts of the display for children—Santa's house and the talking wishing well. Although the Court recognizes that one cannot see the creche from all possible vantage points, it is clear from the City's own photos (*see*, especially, Def. Ex. C1) that people standing at the two bus shelters and looking down at the display will see the creche centrally and prominently positioned.

Having disposed of the City's first two arguments, the Court finally must resolve whether Pawtucket's "mere" inclusion of a nativity scene in a display containing numerous secular symbols of Christmas violates the Establishment Clause. May Pawtucket constitutionally erect the creche as long as it does not attempt overtly to encourage persons to worship at or accept the religious message of, the creche? The Court finds that, despite its "passive nature," erection of the creche has the real and substantial effect of affiliating the City with the Christian beliefs that the creche represents.

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[37] The City seems unwilling to accept the label "life sized". That is, however, the description that appears on the invoices produced at trial. *See* Pl. Ex. 5.

Pawtucket contends that the inclusion of the creche does not have a primarily religious effect because the secular symbols in the display shift the viewer's attention away from the creche's religious symbolism. The Court disagrees that the secular context in which the creche is viewed is as neutralizing as the City's argument suggests. The secular and religious aspects of Christmas co-exist comfortably. Thus, when the City commingles secular and religious symbols in the display, it simultaneously evokes both dimensions of Christmas. Santa Claus is not rendered religious by his proximity to the creche; the creche is not rendered secular by its proximity to Santa Claus. In fact, by displaying the nativity scene in a setting with Christmas trees, bright lights, Christmas carols, and other Christmas symbols, the City has placed the creche in a setting *supportive* of its meaning. *See Allen* v. *Morton*, 495 F.2d at 89 & n.55 (opinion of Leventhal, J.).

Having found that the presence of the secular symbols of Christmas does not mute the religious message of the creche, the Court concludes that people who view the Hodgson Park display are not likely to regard the nativity scene as a mere "acknowledgement" that religious "heritage" and "traditions" are for some people a part of Christmas. The City's Christmas display is neither a museum exhibit where one goes expecting to see cultural artifacts, nor an educational course in which one expects to be taught about heritage and tradition. *Cf. Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) (upholding regulations governing the teachings in public schools about religious meaning and traditions of holidays).[38] The display is a celebration of the holiday, not an exposition about it.

[38] The City relies heavily on *Florey* to support its position. *Florey* involved a facial challenge to regulations adopted in response to complaints that certain holiday exercises in the district's public schools were religious. The regulations appeared to be a good faith attempt to neutralize overtones of religious endorsement by specifying how schools could teach *about* religious aspects of holidays without teaching religion. At the time the Court of Ap-

Furthermore, the Court finds that Pawtucket has done nothing to shift the viewer's attention away from the creche's religious message or to counteract viewers' reasonable inference that the creche is there because the City supports that message and wishes to promulgate it.[39] The City has not

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peals considered the case, the regulations had not been in effect long enough to produce a record of how theory was translated into practice.

In analyzing the applicability of *Florey* to this case, one must consider two points. First, *Florey* involved a school—a setting which, although especially delicate for Establishment Clause issues, is more conducive to instruction about culture and heritage than is a municipal holiday display. One goes to school expecting to learn about the world and the people in it. That is not one's expectation in going to Pawtucket's Christmas display. More important, the actual effect of applying the regulations in *Florey* was not known. 619 F.2d at 1319. It is only by looking at how religious symbols are actually used in the teaching process, including the relative amounts of emphasis given to Christian and non-Christian traditions, that one can determine whether a benign secular purpose has been successfully implemented to produce an effect only remotely or incidentally favorable to religion. *See generally* 619 F.2d at 1320-30 (McMillan, J., dissenting). In this case, the actual effects of the challenged practice can be observed and, in the Court's opinion, are constitutionally defective irrespective of purpose.

[39] Pawtucket has included in the display no explanatory plaques, *cf. Allen v. Morton*, 495 F.2d at 69 & n.2, (opinion of Tamm, J.), expressly disclaiming any affiliation with the theological message of the creche. It has no ongoing practice of marking the religious heritage and traditions of other, non-Christian groups by means of lavish public displays, which *might* indicate that the City's goal was impartial and educational, as well as dispel what is now the appearance of blatant discrimination in favor of one religion.

The Court wishes to make it very clear, however, that it is *not* holding that the initiation of one or even both of these latter practices would necessarily be sufficient to meet Establishment Clause objections. As a practical matter, the Court anticipates that it would be very difficult to dissipate the appearance of endorsement that comes when government employs a religious symbol of the majority religion in a setting supportive of its meaning. The difficulties involved in giving comparable time, money, and attention to the customs and traditions of various religious groups, in order to avoid the appearance of partiality and, thus, sponsorship, would be formidable. Moreover, if Pawtucket embarks on a program of "acknowledging" divers religions' customs and traditions, would it be impermissible favoring all religions over nonbelievers? What about the potential divisiveness caused by different groups demanding their share of City resources and recognition? In sum, such a "cure" may cause worse problems than the "disease".

dispelled the appearance of approval of and affiliation with, the Christian view of Christmas.[40]

In view of the creche's unmuted religious message and the undispelled appearance of Pawtucket's affiliation with this message, this Court holds that the City's inclusion of a nativity scene in its Christmas display violates the Establishment Clause. Even if the creche does advance the nontheological goals of peace, charity, and goodwill, the Court finds that the appearance of official sponsorship of Christian beliefs that the creche conveys confers more than a remote and incidental benefit on Christianity. By using a religious symbol in a seasonal celebration of a holiday having religious significance for some groups, the City has given those groups special status. It has singled out their religious beliefs as worthy of particular attention, thereby implying that these beliefs are true or especially desirable. This aura of governmental approval is a subsidy as real and as valuable as financial assistance. Moreover, Pawtucket's use of the creche encourages in its citizens the belief that the Christian majority has the right to have "its" government reflect and express the religious beliefs that the majority regards as important. Were the notion that it is desirable for government to support the religious views of the majority to become so ingrained as to be accepted without

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[40] This conclusion is reinforced by the opinions expressed in cards and letters of support received by Mayor Lynch after this lawsuit was filed. Although some writers found no religious content in the inclusion of the creche, most apparently believed that the presence of the nativity scene recognized and affirmed the Christian beliefs of the majority of the community.

The City argues strenuously that these letters are relevant only in assessing the effect of the *lawsuit*, not the effect of the *creche*. The Court believes that this argument ignores the commonsense connection between the two. Although the lawsuit clearly prompted the letters, and although many letters contain the writer's opinions about the plaintiffs' action, people's opinions about the lawsuit are a product of their feelings about and reactions to, the City's use of the creche.

Finally, it should be noted that Mr. Brown's testimony about the views of persons who called the talk show on which he appeared suggested a range of opinions very much like that revealed in the Mayor's letters.

scrutiny and defended without hesitation, a significant breach would be made in the constitutional citadel that protects our religious liberty.

C. *Entanglement.*

The final part of the Establishment Clause's tripartite test focuses on the degree and quality of governmental interaction with religion that the challenged activity promotes. *See Committee for Public Education* v. *Nyquist*, 413 U.S. at 794-97; *Lemon* v. *Kurtzman*, 403 U.S. at 615. The entanglement inquiry has two parts. The first, often referred to as "administrative entanglement," is implicated when the practice at issue brings government officials into close, ongoing contact with the affairs of religious institutions, thereby endangering the independence and integrity of both Church and State. *See, e.g., Lemon* v. *Kurtzman*, 403 U.S. at 615-20; *Meek* v. *Pittinger*, 421 U.S. at 369-72. The second part of the inquiry focuses on "the potential for political divisiveness." *Lemon* v. *Kurtzman*, 403 U.S. at 623. This half of entanglement analysis is based on the recognition that "competition among religious sects for political and religious supremacy has occasioned considerable civil strife, 'generated in large part' by competing efforts to gain or maintain the support of government." *Committee for Public Education* v. *Nyquist*, 413 U.S. at 796, *quoting Everson* v. *Board of Education*, 330 U.S. at 89. This second component assesses the probability that the governmental involvement with religion at issue will encourage division of the polity along religious lines and infect robust political debate with an unhealthy strain of sectarian contentiousness. *Id.* at 796 n.54. One need look back into history to understand the seriousness of this latter concern about political divisiveness; the contemporary situation in several countries amply demonstrates the dreadful struggles and suffering that can result when government becomes a tool for executing religious goals and beliefs.

Unquestionably, administrative entanglement has not occurred in this case. The evidence shows that Pawtucket purchased the components and designed the layout of the Hodgson Park display without interaction with any of the community's churches or religious organizations. *Cf. Allen* v. *Morton*, 495 F.2d at 79-85 (opinion of Leventhal, J.). In the Court's opinion, however, Pawtucket's ownership and display of the creche does implicate the political divisiveness strand of the entanglement test.

The cases in which the Supreme Court has discussed potential divisiveness have involved new programs with little or no "track record" of operation. Thus, in these cases, the Court had to project the potential for divisiveness by considering such factors as the need for recurrent budgetary appropriations, *compare Lemon* v. *Kurtzman*, 403 U.S. at 623 (annual) *with Tilton* v. *Richardson*, 403 U.S. at 688 (single lump sum), and the nature of the constituency that would be concerned about the government's action, *see Tilton* v. *Richardson*, 403 U.S. at 688-89 (contrasting the "essentially local" nature of primary and secondary school problems with the "diverse and widely dispersed" constituency of colleges and universities).

This case is different. The creche has a "track record." As the City properly points out, a City-owned creche, has been displayed for forty years. Moreover, the practice has been marked by no apparent dissention. That calm history must be acknowledged in assessing the potential for divisiveness in the City's action.

The meaning of this history is ambiguous. Was the silence of the past forty years a healthy sign, indicating that members of minority religions did not feel slighted or alienated by the practice and had no desire for "equal time" for the religious holidays and symbols? Or, was the silence an unhealthy indication of the fear of angering the predominantly Christian majority? In short, was it the product of a pragmatic calcula-

tion that enduring one religious symbol celebrating one Christian holiday was a small price to pay for harmony among the townspeople?

The community's reaction to the filing of this lawsuit lends considerable plausibility to the latter interpretation. The City suggests that a "fair representation of the public concern is that it was directed at a perceived attack upon the symbolism of Christmas which is generally viewed as a symbolism of goodwill and brotherhood." (Memo at 27). However, the Court has found that most of those who communicated their support for the Mayor were not defending a nonsectarian emblem of theologically neutral aspirations. Rather, the creche was championed as the essence of the "true" meaning of Christmas, the vehicle by which belief in and dependence upon God could best be conveyed during the holiday season. Several comments explicitly linked display of the creche with the expression of the majority's faith in Christ and its desire to commemorate his birth, and castigated "minority" attempts to prevent government from reflecting the majority's will in this manner.

Furthermore, religious leaders have come forward and encouraged the City to confine its holiday celebrations to nonsectarian symbols. Other religious leaders have responded angrily, sometimes questioning the spiritual commitment of the first group. *See* clippings and letters in Pl. Exs. 11 & 12. The few persons who wrote Letters to the Editor urging removal of the creche encountered furious criticism, usually expressed in terms of religious views and convictions. Former Mayor Lynch mustered City employees for a show of support at the creche, leading the crowd in carols by suggesting that they sing "another one that apparently bothers people." Clipping in Pl. Ex. 12. In sum, the atmosphere has been a horrifying one of anger, hostility, name calling, and political maneuvering, all prompted by the fact that someone had questioned the City's ownership and display of a religious symbol.

A reasonable interpretation of this public reaction is that Pawtucket's practice of displaying a creche occasions no divisiveness *only* as long as it continues unquestioned. Once challenged, however, the veneer of peace and harmony is stripped away. The absence of religious dissension in Pawtucket over the past forty years does not mean that the governmental action has not produced a division along religious lines. It merely means that until the plaintiffs in this case had the temerity to challenge Pawtucket's official practice, the *potential* for divisiveness remained unrealized. When the challenge finally came, the atmosphere in Pawtucket became charged with religious controversy and polluted by the acrid fumes of religious chauvinism.

The Supreme Court has never held that the potential for political divisiveness is alone sufficient to invalidate a government's action under the Establishment Clause. It has emphasized, however, that this is a "warning signal" that the mandate of the First Amendment has been compromised. *See Committee for Public Education* v. *Nyquist*, 413 U.S. at 798. Viewing this warning signal of potential divisiveness in conjunction with its earlier findings of improper purpose and impermissible effect, the Court concludes that the Establishment Clause has been violated in this case.

IV.

Having spent considerable time exploring what this case is about, the Court feels compelled to add a few words about what it is *not* about. It is not about an infringement of the right of Christians freely to express their belief that Christmas is the day on which the Son of God was born. This decision has nothing to do with the ability of private citizens to display the creche in their homes, yards, businesses, or churches. However, the right to express one's own religious beliefs does not include the right to have one's government express those beliefs simply because the believers constitute a majority.

Our form of government is grounded in the principle that the soundest course for our country is most likely that plotted by the majority of our people. However, the Bill of Rights is a cardinal exception to that principle, mandating that in a few, vital areas the demands of the majority must yield for the ultimate good of all. "We have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion." *Torcaso* v. *Watkins*, 367 U.S. at 493-94, *quoting McCollum* v. *Board of Education*, 333 U.S. at 213 (Frankfurter, J., concurring). We cannot have it both ways—a government that scrupulously honors each person's freedom of belief and yet publicly aligns itself with one particular set of beliefs. The endorsement of one is a disparagement of others that were not chosen, and it becomes increasingly difficult to accord equal respect to what has been publicly marked as less worthy.

The First Amendment requires that government provide an atmosphere of intellectual and spiritual freedom of thought and expression. In such an atmosphere, beliefs that have the strength of truth will flourish of their own power. Religion may demand, and government may give, no more than this. "We are a religious people whose institutions presuppose a Supreme Being. Under our Bill of rights free play is given for making religion an active force in our lives. But if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals or groups, not by the Government." *Engel* v. *Vitale*, 370 U.S. at 443 (Douglas, J., concurring) (citations, quotation marks, and footnotes omitted).

This Court finds that by including a nativity scene in its Christmas display, the City of Pawtucket has violated the Establishment Clause of the Constitution. Therefore, it is hereby ordered that the City be permanently enjoined from continuing this practice.

So ordered.

Enter:
s/ RAYMOND J. PETTINE
Chief Judge
November 10, 1981

By Order,
s/ GAIL E. DANIEL
Chief Deputy Clerk

Office - Supreme Court, U.S.
FILED
JUN 10 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1256

In the Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS LYNCH, INDIVIDUALLY AND AS MAYOR OF THE CITY OF PAWTUCKET, RICHARD A. MUMFORD, INDIVIDUALLY AND AS FINANCE DIRECTOR FOR THE CITY OF PAWTUCKET, AND GUY DUFAULT, INDIVIDUALLY AND AS DIRECTOR OF DEPARTMENT OF PARKS AND RECREATION OF THE CITY OF PAWTUCKET, AND THE CITY OF PAWTUCKET,

PETITIONERS,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER And AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 26, 1983
CERTIORARI GRANTED APRIL 18, 1983

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

No. 82-1256

DENNIS LYNCH, ET AL.,
PETITIONERS,
v.
DANIEL DONNELLY, ET AL.,
RESPONDENTS.

Relevant Docket Entries

1980

Dec. 17 Summons and Complaint filed A Motion for a Temporary Restraining Order filed together with appearance of Sandra Blanding, attorney at law, for plaintiff.

1981

Jan. 7 Defendants' Answer filed together with appearance of Marifrances McGinn, attorney at law, for defendants.

Jan. 23 Entry of appearance of William F. McMahon, Esq. for defendants.

Feb. 3 Case goes to trial. William F. McMahon, Esq. and Sandra Blanding, attorney at law, make their opening statements. Plaintiffs' witnesses Daniel Donnelly and Steven Brown sworn, defendants' witness Guy Dufault sworn. Plaintiff Exhibits 1-7 and defendants' Exhibits A, B, C-1-7 submitted.

Feb. 5 Trial continues. Defendants' witnesses Richard Mumford and Mayor Dennis Lynch sworn and plaintiff's witnesses Dr. Michael Werle and Rev. Thomas Ramsby sworn. Plaintiff's Exhibits 8,a-g, 9, 10, 11 and 12 submitted.

Feb. 6 Trial continues. Defendants' witnesses Aaron Stoller, Dennis Moore and David Freeman sworn. Plaintiff and defendant closing arguments.

1981

Mar. 30 Transcript of proceedings on 2/3 and 2/5/81 filed by Court Reporter.

Aug. 31 Tentative Opinion of Judge Raymond Pettine dated August 31, 1981, re: ACLU has no standing to sue the City of Pawtucket. Judge Pettine gives parties ten days to file a response.

Sept. 18 Motion to Amend Complaint is filed by plaintiffs.

Oct. 15 Answer to Amended Complaint filed by defendants.

Oct. 16 Affidavits of George Kriebel, Robert Goodwin and Gregory Frazier filed by plaintiffs and order granting plaintiffs' motion to amend complaint.

Nov. 10 Opinion and Order entered and filed finding that defendant City of Pawtucket did violate the Establishment Clause of the Constitution by including a nativity scene in its Christmas display and ordering the defendant permanently enjoined from continuing this practice. Judgment entered.

Nov. 16 Defendants' Notice of Appeal filed.

Dec. 1 Record on appeal together with exhibits from hearing mailed to Clerk of the United States Court of Appeals for the First Circuit, Boston, Massachusetts.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[CAPTION OMITTED IN PRINTING]

RELEVANT DOCKET ENTRIES

1981

Dec. 4 Motion for Stay of an Order pending appeal and memorandum together with a Motion for an expedited hearing.

1981

Dec. 10 Entry of appearance of William F. McMahon, Esq. and Marifrances McGinn, attorney at law, for appellant and entry of appearance of Sandra A. Blanding, attorney at law, and Amato A. DeLuca, Esq., for appellees.

Dec. 11 Memo & Order denying Motion for Stay.

Dec. 18 Order scheduling the case for the April 1982 session.

1982

Apr. 5 Appearance of Spencer W. Viner, Esq. for appellants received and filed.

Apr. 7 Heard on the merits by Justices Fairchild, Campbell and Bownes.

Nov. 3 Judgment affirming the District Court, opinion of the Court by Fairchild, J., concurring opinion by Bownes, J., and dissenting opinion by Campbell, J.

SUPREME COURT OF THE UNITED STATES

[CAPTION OMITTED IN PRINTING]

RELEVANT DOCKET ENTRIES

1983

Jan. 26 Petition for Certiorari filed.

Apr. 18 Order of Supreme Court granting Petition for a Writ of Certiorari.

Opinions Below

The Opinion of the Court of Appeals is contained in the Petition for Certiorari at pp. A-1 - A-20.

The Opinion of the United States District Court for the District of Rhode Island is contained in the Petition for Certiorari at pp. A-21 - A-74.

IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF RHODE ISLAND

[CAPTION OMITTED IN PRINTING]

AMENDED COMPLAINT

I. JURISDICTION

1. This is a civil action brought under 42 U.S.C. §§1983 and 1988 by plaintiffs to secure a temporary and permanent mandatory injunction against the construction, maintenance, and continued display of a creche depicting the biblical birth of Christ located on Hodginson Park, on public property, and against the allocation and use of funds of the City of Pawtucket, for the support of, or to finance in whole or in part the construction, maintenance, protection, and continued display of the creche and for a declaratory judgment that such use of city funds and city property violates the First and Fourteenth Amendments to the United States Constitution.

2. This Court has jurisdiction of the matter in controversy pursuant to 28 U.S.C. §§1331, 1343, 2201, and 2202.

3. The amount in controversy and exclusive of interest and costs is in excess of Ten Thousand ($10,000.00) Dollars as more fully appears hereafter.

XI. PARTIES

4. Plaintiff, George Kriebel, is a citizen, resident, and taxpayer of the City of Pawtucket, State of Rhode Island, and of the United States, and is also a dues paying member of the American Civil Liberties Union, Rhode Island Affiliate, and regularly pays taxes which finance the operation and maintenance of city property.

5. Plaintiff, Robert Goodwin, is a citizen, resident, and taxpayer of the City of Pawtucket, State of Rhode Island, and of the United States, and is also a dues paying member of the American Civil Liberties Union, Rhode Island Affiliate, and regularly pays taxes which finance the operation and maintenance of city property.

6. Plaintiff, Greg Frazier, is a citizen, resident, and taxpayer of the State of Rhode Island, and of the United States, and regularly pays taxes which finance the operation and maintenance of city property.

7. Plaintiff, American Civil Liberties Union, Inc., Rhode Island Affiliate, is a non-profit organization, organized under and by virtue of the laws of the State of Rhode Island. The purpose of this Corporation is to protect and advance the constitutional rights of citizens of the United States and of the State of Rhode Island, including the members shared individualed right to a government that does not establish religion.

8. Defendant, Dennis Lynch, is and at all times pertinent hereto, has been the Mayor of the City of Pawtucket, and is sued individually and in that capacity.

9. That defendant, Guy Dufault, is and at all times pertinent hereto, has been the Director of the Department of Parks and Recreation of the City of Pawtucket, and is sued individually and in his official capacity.

10. Defendant, Richard A. Mumford, is Finance Director of the City of Pawtucket, and is sued in that capacity pursuant to the provisions of Rhode Island General Law §45-15-5.

III. Statement of Facts

11. The City of Pawtucket is now and at all times pertinent hereto has been the owner of certain property within the City and known as Hodginson Park, which property is leased to the Historical Society of the City of Pawtucket.

12. That the City of Pawtucket has regularly erected an annual display of a nativity scene on the property known as Hodginson Park, and the City owns, constructs, and maintains said nativity scene through the use of City of Pawtucket employees, who are employed to work on the City's Christmas display from Thanksgiving to January 1 of each year.

13. The creche or nativity scene depicts the birth of Christ, attended by his mother, Mary, St. Joseph, and other figures. Content of this display is based on the biblical descriptions of the birth of Christ. Also part of the display is a sound system on which religious Christmas music is broadcast to passersby and public.

14. To plaintiffs' information and belief, sums have been appropriated and will be expended by the defendants for the construction, erection, and maintenance of the nativity scene and the attendant sound system. This expenditure of public funds involves an excessive entanglement between government and religion, and intensifies fragmentation and divisiveness on religious lines, as well as constituting establishment of religion.

15. Defendant, Guy Dufault, as Director of the Department of Parks and Recreation of the City of Pawtucket, is responsible for supervising and directing the city employees who erect, construct, maintain, and protect said nativity scene.

16. Plaintiffs have no adequate remedy at law and will suffer irreparable harm by the continued construction, erection, maintenance, and protection of the nativity scene and attendant broadcasting of religious music by the City of Pawtucket and the defendants named herein.

17. Defendants will not be harmed by the issuance of a temporary and permanent mandatory injunction preventing the display of religious symbols and playing of religious music on city owned property, through the use of city employees and the expenditure of city tax funds.

18. Defendants are likely to succeed on the merits of their complaint, as appears more fully in the accompanying memorandum.

19. Defendants were at all times acting under color of law.

IV. First Cause of Action

20. Plaintiffs hereby incorporate paragraphs 1 through 19 above and for their first cause of action allege that the nativity scene described herein and the attendant public address system constitutes a religious symbol and that by constructing, erecting, maintaining, and protecting this nativity scene and public address system on city owned property and through the use of city employees and the expenditure of city tax funds, the defendants have violated and are continuing to violate the Establishment Clause of the First Amendment, incorporated in the Fourteenth Amendment to the United States Constitution, by sponsoring government action whose principal and primary effect is to advance religion and which has caused and continues to cause excessive government entanglement with religion.

V. Second Cause of Action

21. Plaintiffs hereby incorporate paragraphs 1 through 20 above and for their second cause of action allege that by constructing, erecting, maintaining, protecting, and sponsoring the nativity scene and attendant public address system described herein on city owned property and through the use of city employees and the expenditure of city tax funds, the defendants have created and maintained and continue to create and maintain a religious symbol evincing a religious purpose, and have thereby interferred with and continue to interfere with the rights of Plaintiffs, who are citizens and members of plaintiff organization, to the free exercise of their religion, guaranteed by the First Amendment, and incorporated in the Fourteenth Amendment of the United States Constitution.

WHEREFORE, plaintiffs pray:

1. For a declaratory judgment that the construction, erection, maintenance, and protection of the nativity scene and attendant public address system described herein on city owned property in the City of Pawtucket, and through the use of city employees and the expenditure of city tax funds violates the Establishment Clause and Free Exercise Clause of the First and Fourteenth Amendments of the United States Constitution.

2. For a mandatory injunction ordering defendants to remove and temporarily and permanently enjoining them from future construction, erection, maintenance, or protection of the nativity scene and attendant public address system on city owned property, through the use of city employees or through the expenditure of city tax funds, and further enjoining the defendants from making any further expenditures of city funds directly or indirectly in whole or in part, to construct, maintain, or protect the nativity display.

3. For an Order granting plaintiffs' reasonable attorneys' fees and costs of maintaining this action.

4. For a preliminary injunction, pending the trial of the issues, against the defendants for the relief set forth in paragraphs 1 and 2 herein.

5. For such other relief as the Court deems just and proper.

GEORGE KRIEBEL
ROBERT GOODWIN
GREG FRAZIER
STEVEN BROWN, Executive Director
American Civil Liberties Union,
Rhode Island Affiliate

That we, George Kriebel, Robert Goodwin, Greg Frazier, and Steven Brown, in his capacity as Executive Director of the American Civil Liberties Union, Inc., Rhode Island Affiliate, first being duly sworn, on oath, depose and say that we have read the foregoing complaint and that it is true to the best of our knowledge and belief.

GEORGE KRIEBEL
ROBERT GOODWIN
GREG FRAZIER
STEVEN BROWN, Executive Director
American Civil Liberties Union,
Rhode Island Affiliate

[CERTIFICATION OMITTED IN PRINTING]

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ANSWER TO AMENDED COMPLAINT

I. JURISDICTION

1. The Defendants are without knowledge sufficient to form a belief as to the truth of the allegations set forth in Paragraph 1 and leave Plaintiffs to their proof thereof.

2. The Defendants admit the allegations set forth in Paragraph 2.

3. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 3 and leave Plaintiffs to their proof thereof.

II. PARTIES

4. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 4 and leave Plaintiffs to their proof thereof.

5. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 5 and leave Plaintiffs to their proof thereof.

6. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 6 and leave Plaintiffs to their proof thereof.

7. The Defendants admit the allegation set forth in Paragraph 7.

8. The Defendants admit the allegations set forth in Paragraph 8 except that on or about July 13, 1981, Dennis M. Lynch resigned as Mayor and William F. Harty, Jr. became and as of the date hereof is Mayor of the City of Pawtucket.

9. The Defendants admit the allegation set forth in Paragraph 9.

10. The Defendants admit the allegation set forth in Paragraph 10.

III. Statement of Facts

11. The Defendants deny the allegations set forth in Paragraph 11.

12. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 12 and leave Plaintiffs to their proof thereof.

13. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 13 and leave Plaintiffs to their proof thereof.

14. The Defendants deny the allegations set forth in Paragraph 14.

15. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 15 and leave Plaintiffs to their proof thereof.

16. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 16 and leave Plaintiffs to their proof thereof.

17. The Defendants deny the allegations set forth in Paragraph 17.

18. The Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 18 and leave Plaintiffs to their proof thereof.

19. The Defendants admit the allegation set forth in Paragraph 19.

IV. First Cause of Action

20. The Defendants hereby incorporate by reference their answers to Paragraphs 1 through 19 inclusive which the Plaintiffs have incorporated by reference and deny the allegations set forth in Paragraph 20.

V. Second Cause of Action

21. The Defendants hereby incorporate by reference their answers to Paragraphs 1 through 20 inclusive which the Plaintiffs have incorporated by reference and deny the allegations set forth in Paragraph 21.

By their Attorney,

William F. McMahon
742 Howard Building
Providence, RI 02903
Attorney for Defendants

[Certification Omitted in Printing]

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF RHODE ISLAND

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STENOGRAPHIC TRANSCRIPT OF TRIAL

[6] DANIEL DONNELLY,

having been first duly sworn, testified as follows:

Direct Examination By Miss Blanding

• • •

[9] MISS BLANDING: I'd ask that these be marked.

THE COURT: Any objection to the introduction?

MR. McMAHON: No objection.

THE COURT: No objection, they may be marked as a full exhibit. May I see them, please.

(Photographs handed to Court.)

(Eight photographs marked Plaintiff's Exhibit 1.)

Q. Mr. Donnelly, would you describe approximately how large the nativity scene that you saw in Hodgson Park and is represented in those pictures is? A. There were approximately twelve to fourteen statues and a small manger that comprises the nativity scene. The statues ranged from two feet to four feet and the manger was about five feet high and inside there was straw with a statue of the baby lying inside the manger.

Q. Was there also a stable or building around it? A. Yes, it wasn't a complete building, it was a set of boards that outlined the shape of a barn or some kind of manger.

Q. And what did that nativity scene represent to you?

MR. McMAHON: Objection, Your Honor.

THE COURT: No, overruled.

[10] A. It represented a religious display which depicted the birth of Christ.

Q. Where could you see the scene from or where did you see it from? A. I saw it while walking, I forget the name of

the street, but the street the City Hall is on, walking along that street doing Christmas shopping and I had paid particular note to it and I had also observed it from inside the park itself.

Q. And did you know that it was sponsored by the city of Pawtucket?

MR. McMAHON: Objection.

THE COURT: Well, he can answer that yes or no, did he know.

A. Yes.

Q. When you first saw this nativity scene what reaction, if any, did you have toward it?

MR. McMAHON: Objection, Your Honor.

THE COURT: Well, Mr. McMahon, it does seem to me that that's admissible evidence because one of the issues in this case is the question of devisiveness as to the reaction it has on the citizens themselves and so that the subjective aspect is admissible evidence as I see it. I feel constrained to overrule your objection. All right, go ahead.

[11] A. My initial reaction was one of fear, I was frightened by the nativity scene.

Q. Why were you frightened of it? A. Because of recent events on national and state levels, I've been very concerned that various religious groups are becoming more and more politicized and are exerting and trying to impose their views on the larger society and to me the nativity scene at that time represented a concrete example of that.

Q. A concrete example of what, I'm sorry, I didn't follow you. A. A concrete example of the power of religious groups to have their artifacts displayed by the city.

Q. And what if any—okay—you say that you were afraid because of recent events where religious groups had become politicized and you felt that the nativity scene was an example of that. A. Yes.

Q. What, if any, relationship do you feel that that had to the city of Pawtucket's erecting this nativity scene? A. I'm

sorry, I don't believe I understand the question.

Q. Did you have a feeling or opinion as to the city's purpose in erecting the scene?

MR. McMAHON: Objection, Your Honor, that's a conclusion of law.

MISS BLANDING: Your Honor, I believe that the witness's—

THE COURT: I haven't ruled yet.

MISS BLANDING: I'm sorry.

THE COURT: At least as to whether or not he had a feeling, the affirmative or the negative, can be placed on the record. He may not have any feeling and that would be the end of it so let's find out.

THE WITNESS: I felt that that represented—

THE COURT: No, no, you just answer yes or no. Read the question back to the witness.

(Previous question read back.)

A. Yes, I did.

Q. And what was that feeling?

MR. McMAHON: Objection, Your Honor.

THE COURT: Yes, that must be sustained. He can give us his subjective reaction to it but how does he know what the city's purpose was.

MISS BLANDING: Your Honor, I'm not asking him to answer what objectively was the city's purpose, I'm asking him to answer what he perceived the city's purpose to be and I believe—

THE COURT: Well, frame it that way and I will allow the question.

Q. What did you perceive the city's purpose to be in [13] erecting the nativity scene? A. I perceived that the city—

MR. McMAHON: Objection, Your Honor.

THE COURT: Overruled.

A. I perceived that the city was demonstrating its support for a particular religious viewpoint.

Q. And what, if any, feeling do you have about that?

MR. McMAHON: Objection, Your Honor.

THE COURT: Overruled.

A. I feel that no municipality should demonstrate support for any religious viewpoint.

Q. Why do you feel that way?

MR. McMAHON: Objection to this line, Your Honor.

THE COURT: Yes, I understand, I'll overrule it.

A. I felt that way because I strongly believe in a separation of church and state.

Q. As a result of your feelings that church and state should be separate and that the city's erection of a nativity scene is supportive of religious beliefs did you have a feeling as to whether or not your interest in the separation of church and state had been injured in any way?

MR. McMAHON: Objection, Your Honor.

[14] THE COURT: Subjective reaction is admissible, I'll allow it.

A. Yes, I did.

MISS BLANDING: I have no further questions, Your Honor.

Cross Examination By Mr. McMahon

XQ. (By Mr. McMahon) Mr. Donnelly, the first tax bill you received from the city of Pawtucket was for the year 1977, is that correct? A. I believe so, I'm not positive.

XQ. You never paid that bill, isn't that correct?

MISS BLANDING: Objection.

THE COURT: Overruled.

A. There is one tax bill that I have outstanding with the city of Pawtucket because of a situation that I've been trying to straighten out regarding the car that was registered in my name but that I don't actually own.

THE COURT: That doesn't answer the question that was asked of you by Mr. McMahon. He said the first tax bill you received was for 1977 followed by the inquiry as to whether or not you paid that bill.

THE WITNESS: No, I did not I don't believe.

XQ. Now another bill was sent to you for the year 1978, is that correct? A. Yes, sir.

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[23] Defendant's Exhibit B, that's correct, is it not? A. A small portion of the nativity scene is.

THE COURT: May I see that, please.

(Exhibit B handed to Court.)

THE COURT: Would you kindly point out to me—oh, I think I see it, it's sort of in back of the tree, is that what you mean?

MR. McMAHON: Immediately to the right, it merges into it, Your Honor.

THE COURT: Is that where you mean?

MR. McMAHON: Yes.

THE COURT: Okay, thank you.

XQ. Now Mr. Donnelly, the Christmas display includes a Santa Claus and reindeer closely behind and arising above the nativity scene, is that not correct?

MR. DeLUCA: Objection, Your Honor.

THE COURT: No, overruled. Now you said includes a Santa Claus and reindeer and how did you describe that, that rises?

MR. McMAHON: I'll withdraw and define it more specifically, Your Honor.

THE COURT: All right, re-phrase it then.

XQ. Mr. Donnelly, between the nativity scene and westerly river wall of the Blackstone River there is a Santa Claus and reindeer which rises higher than the nativity [24] scene, is that not correct? A. Yes, it is correct.

XQ. Do you object to that portion of the Christmas display on the ground of its religious content? A. The Santa Claus and reindeer, no, I don't.

XQ. Now to the southwest of the nativity scene by a matter of fifteen to twenty feet there is a very large Christmas tree, is there not? A. Yes, there is.

XQ. Do you object to that as a religious symbol? A. No, I don't.

XQ. And there is a wishing well nearby, is there not, which is part of the Christmas display? A. I don't recollect a wishing well.

XQ. Now with respect to the Christmas display itself—strike that—with respect to the nativity scene itself there are small figurines of animals in that scene, are there not? A. Yes, there are.

XQ. Do you object to the figures of those animals as religious symbols? A. Yes, I do, because they're part of the scene that depicts a specific religious event. As to themselves I don't find animals to be, those animals to be religious but because of what they're part of I do.

[23] XQ. In other words, it's your testimony that the symbolism depends upon what the symbol is a part of, is that your testimony? A. It depends upon the entire context of what's being symbolized, not the individual pieces that make up that scene.

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[36] STEVEN BROWN,
having affirmed, testified as follows:

Direct Examination By Miss Blanding

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Q. Mr. Brown, did you ever see the Christmas display and the nativity scene that's the subject of this complaint? A. Yes, I did.

Q. When did you see it? A. Shortly after I received the information I went and visited it twice.

Q. And that was in December of 1980? A. That's correct.

Q. And what was your feeling upon seeing it?

MR. McMAHON: Objection, Your Honor.

THE COURT: It seems to me that must be admitted, Mr. McMahon, that's one of the questions, what reaction it has on the public. I will allow the question, go ahead.

A. I was offended by it. I was also upset that the city was sponsoring a display of that sort.

Q. Why were you offended by it?

MR. McMAHON: Objection, Your Honor.

THE COURT: Overruled.

A. I was offended for a number of reasons. I believe very strongly in the principle behind the First Amendment which I consider to be that of separation of church and state. I do not believe the government has any business involving itself in religion. I think it's important both from the point of view of the citizen [44] of the state or of the country as well as from a person who is concerned about religious strength. I don't believe that either the government or religion is served when the two of them get involved in joint ventures such as this.

Q. So that you perceived the nativity scene as a joint venture, is that what you're saying? A. That's right, I perceived it as the government sponsoring and supporting a particular religious viewpoint.

Q. When you see a nativity scene such as the one in the Pawtucket display what significance does that have to you?

MR. McMAHON: Your Honor, in order to save time will the Court please give me a line objection to subjective impressions about the display?

THE COURT: Certainly.

A. It signifies the birth of Christ.

Q. And does the birth of Christ have a significance to you? A. It has a religious significance to me, yes.

Q. Besides the initial complaint you received regarding the Pawtucket nativity scene, have you as Executive Director of the ACLU personal knowledge of any expressions of public feelings or sentiments towards the city's display?

[45] MR. McMAHON: Objection.

THE COURT: He may answer that just yes or no. You realize that you might be entering into the field of hearsay evidence if you're going to ask him to repeat what he's been told.

MISS BLANDING: Your Honor, I was going to ask him the substance of those complaints and I believe that that comes under an exception to the hearsay rule as a, an expression of feeling or state of mind which is an exception whether the declarant is available or not available.

THE COURT: You want to argue the point?

MR. McMAHON: Oh, certainly, Your Honor. I know of no such exception. This man is an employee of a corporation, if he can relate verbal expressions made to him that an employee of any corporation can testify as to hearsay on any subject in which the corporation happens to have an interest.

THE COURT: Well, do you want to argue this further? I notice you were trying to find, you're looking for Rule 803?

MISS BLANDING: 803(3), Your Honor.

THE COURT: I know that's what you're looking for and I opened it up to 803(3).

MISS BLANDING: Your Honor, we would attempt, [46] and this goes to other things that we will attempt to offer, we believe that one of the very important aspects of this case is the divisiveness which has come up as a result of this controversy and that the potential for divisiveness is obviously one of the important factors in the entanglement aspect of the establishment test. Now, I believe that the exception to the hearsay rule regarding a statement of present emotional and mental condition is grounded on the fact that a person stating their present feelings about something is not apt to be, is apt to be telling

the truth, and there are many, there have been many indications to both Mr. Brown and I believe from press reports to Mayor Lynch, and there have been many letters to the editor in the paper regarding people expressing their feelings. Now to get every single one of those people, especially at least of those that we knew the names of, into court to testify that this is how they feel and this is their sentiment when they see the scene will take just an enormous amount of time obviously.
amount of time obviously.

THE COURT: Complete all your arguments before I rule, go ahead.

MR. McMAHON: Your Honor, Miss Blanding has used the word "feeling," what it really is legally is opinion, it's not only hearsay but it's hearsay opinion.

[47] THE COURT: Okay, now the way I interpret what you are attempting to do is to elicit from this witness what impressions he has gotten from calls that he has received or letters that he has received. I assume that what you're trying to do is to show that there is a segment of the public that is opposed to a government sponsored nativity scene and that these protests, if they were such, came immediately following his view of the scene, and came at the time while it was erected and being displayed. The object being to show divisiveness, do I have the right focus on your objectives?

MISS BLANDING: Yes, Your Honor.

THE COURT: All right, now if I have that right focus on your objectives then any statement that this man might make which explains his impressions which he perceived from statements which describe the particular event which are made at the time or immediately thereafter is admissible evidence under 803(1) and they're not introducing these statements for the truth of what they contain but the fact that they were made to him from which he got a general impression of the pulse of the community at that time, at least as to those

people who are part of the community represented by those people who contacted him. I will [48] allow the question.

MISS BLANDING: Thank you, Your Honor. May I ask that the question be read back.

THE COURT: Did you get an impression from all that you heard is the focus here.

THE WITNESS: Yes.

THE COURT: All right and then on what did you base this impression?

THE WITNESS: It was based on the statements that were made to me.

THE COURT: And I suppose the next question is what impression did you get?

THE WITNESS: That there were many people in the community in the state and in Pawtucket who disagreed with our decision to take this case and felt that the city did have a right to sponsor and support the religious views of the majority.

Q. When you say the impression that you got was that the people felt that the city had the right to sponsor the religious views of the majority— A. Yes.

Q. Is that correct? A. Yes.

Q. So is the impression you got from the communications you received that the people who were calling you [49] believed or felt that that is what the city was doing, supporting religious views? A. Absolutely.

Q. And approximately how many of these communications did you receive?

MR. McMAHON: Objection.

THE COURT: Overruled.

Q. Well, in the office I'd say I received about 75 phone calls of various kinds. There were some, of course, that supported our position, most of them were opposed and gave the viewpoint that I expressed earlier. I also appeared on a three hour radio talk show in mid December where again the overwhelm-

ing majority of callers to the talk show expressed that viewpoint.

Q. I show you these and ask you if you can identify them? A. Yes, these are letters to the editor that appeared in the Providence Journal and the Pawtucket Evening Times during the time the lawsuit was filed.

Q. Did you cut these letters out? A. Yes, I did.

Q. Did you make a point to look for them? A. Yes, I did.

Q. And there is handwriting on them with dates, is that your handwriting? A. Yes.

[50] Q. And that would be the dates the letters appeared? A. That is correct.

(Pause)

THE COURT: I think I should also further place on the record here that this also comes under the exception, I think it's 24, is it, the very last exception, 24, right, "Other Exceptions," which is a sweeping exception to overcome the hearsay rule. I checked it to make sure that my memory wasn't playing tricks on me but the pre-trial memoranda which the plaintiffs filed, and I assume that counsel received a copy of this memorandum, specifically states that what they intend to introduce were photographs of the city of Pawtucket's Christmas display, newspaper articles regarding the instant action appearing, editorials and newspaper articles appearing in the Pawtucket Times and that certainly put the defendant on sufficient notice as required by Section 24 which does additionally stamp this kind of evidence with admissibility. All right, go forward.

MISS BLANDING: I would ask that they be marked.

MR. McMAHON: I'm going to object, Your Honor.

THE COURT: And I'm going to allow them to be marked, I feel for the reasons that I stated—yes.

[51] MR. McMAHON: Excuse me, Your Honor, I believe this raises another question, the question we haven't discussed. The documents being introduced show a public impression to this lawsuit, not to the display, this lawsuit, and the evidence

apparently being introduced is that it's this lawsuit that's divisive. Now I suggest that raises an altogether different question.

THE COURT: Well, that goes to the weight of the evidence as to the purposes for which it's being introduced. All right, they may be marked.

CLERK ZINNI: For identification, Your Honor, or as full exhibits?

THE COURT: Full exhibits and I place an exception on the record for defense.

(Letters marked Plaintiff's Exhibit 4.)

MISS BLANDING: I have no further questions of this witness, Your Honor.

Cross Examination By Mr. McMahon

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[53] XQ. Now Mr. Brown, you said that the nativity scene has a religious significance to you personally, isn't that correct? A. Yes, it does.

XQ. Would you describe for the Court what your personal background or familiarity with religion is in terms of education and affiliation? A. I'm Jewish.

XQ. Will you please describe for the Court what, if any, religious training you had in the education in the Jewish faith? A. I went to Hebrew school for approximately ten years.

XQ. What ages, Mr. Brown? A. I'd say from approximately 6 to 16, 5 to 15, around there, I'm not sure.

XQ. Now does the Madonna have a religious significance to you? A. Yes, it does.

XQ. Does the Christmas tree have a religious significance? A. No, it doesn't.

XQ. Do figurines of sheep and other animals have a religious significance to you? A. When viewed in the context of a nativity scene display [54] they certainly do.

XQ. So that you say that the significance of a symbol must be viewed in context, is that correct, that's your testimony, isn't it? A. Oh, I'd say the nativity scene is one symbol in and of itself.

XQ. In other words, as I understand your testimony you're saying that the components of the nativity scene must be considered in context, correct? A. I'm saying that a nativity scene is one thing in and of itself in that it doesn't make sense to try to break it down as you're trying to do.

XQ. Well, I'd like my question to be answered—your testimony is, is it not, that each component of the nativity scene must be viewed in context, isn't that your testimony?

MR. DeLUCA: I object.

THE COURT: Overruled.

A. I don't believe so, I'm simply saying you're right that there is nothing religiously significant in and of itself of a particular animal. That is correct, I will agree to that.

XQ. And there is nothing of a religious significance in and of itself of a wooden crypt held up by hockey sticks, isn't that correct? [55] A. That's probably true.

XQ. And there's no religious significance in and of itself of individuals dispicted as kings or royalty people with crowns on their heads, isn't that correct? A. There is nothing religiously significant about kings in and of themselves, that's true.

XQ. Now there also, figurines representing a male figure, presumably a father, and a female figure, presumably a mother, correct? A. Yes.

XQ. Now in and of themselves they have no religious significance, is that correct? A. In and of themselves the figure of a father and mother do not have religious significance, that is correct.

XQ. So your tesitmony is that the religious significance is derived from all of these elements in context, isn't that a fair statement of your testimony? A. When all the elements, when they are all put together as a nativity scene display, that is correct.

XQ. Okay, now is it also true that in the nativity scene, as part of a secular display, must also be viewed in context, isn't that a fair statement too? A. No, not necessarily.

XQ. So your testimony is that the elements of the nativity scene must be taken in combination but that the [56] nativity scene is not to be taken in combination with other elements of the display, is that your testimony? A. Well, no, it's not that the elements of the nativity scene must be taken in combination, it's that one, one of those symbols in and of themselves are not necessarily religious but when more and more are added together they certainly do become a religious message and that's not changed by the fact that it may be surrounded by other displays that are not necessarily religious. It still is a religious display.

XQ. Well, isn't it true that the kings in the nativity scene are symbolic of giving, they're there with gifts, aren't they? A. Yes, they are.

XQ. They're symbols of giving, isn't that a fair statement? A. I can't say for sure, I'm not an expert on that.

XQ. Well, is it your understanding of the functions of kings in a nativity scene? A. Well, as I understand, again I'm not, I cannot speak as an expert but as I understand they are there to witness the birth of Christ who has a very significant meaning for the Christian religion.

XQ. And significance to you as a member of the Jewish religion of a different sort from— A. That's correct, yes.

[57] XQ. You view this in the light of your whole religious orientation, isn't that correct? A. I would view it in a number of ways including that, yes.

MR. McMAHON: Your Honor, at this point, without hoping not to impose too much on the time of the Court, I would like to confer.

(Pause)

XQ. Mr. Brown, isn't it true that the Jewish religion acknowledges the birth of Christ as a historical fact? A. Anybody must acknowledge that as a historical fact.

XQ. That has nothing to do, that is separate and apart from any religious significance it might have, correct? A. Well, insofar as anybody is born it is an historical fact.

* * *

[61] XQ. So that if there were court of appeals, Federal Court of Appeals decision that said that they may be so displayed then that would be contrary to your views of separation of church and state, isn't that correct?

MR. DeLUCA: Objection.

THE COURT: Yes, that's sustained. This Court will decide what the prevailing authority is.

MR. McMAHON: I'm attempting, Your Honor, to show his personal views are views on questions of law.

THE COURT: Well, you can't attribute to him questions of law, sustained.

MR. McMAHON: No further questions, Your Honor.

THE COURT: Anything further?

Re-Direct Examination By Miss Blanding

Q. (By Miss Blanding) Mr. Brown, I believe you indicated on cross examination that some of the individuals who called you and expressed their viewpoints about the nativity scene and about this suit expressed a viewpoint of the ACLU is perceiving a trivial matter, is that correct? A. That's correct.

Q. Is your impression from what these people told you and their expressions of their opinion, would you say that the general tenor is that this is, that this was a trivial matter to them? [62] A. No, I think the amount and kind of communications we received belie that.

Q. Okay, now you testified as to the nativity scene and its completeness in itself and also as to various figures in the scene? A. Yes.

Q. Would you say that an angel has religious significance? A. Yes, I would.

Q. Were there angels in the nativity scene? A. Yes, there were.

Q. Would you say that figures kneeling in a posture of adoration had a religious significance? A. They could, yes.

Q. And were there figures in that posture in the nativity scene? A. I believe so, yes.

Q. And all of these figures in the scene taken as a whole, I believe you said they had to be taken in combination? A. Yes.

Q. What do you see them as depicting taken in combination?

MR. McMAHON: Objection.

THE COURT: We kind of went through that on direct, Consellor.

MISS BLANDING: Okay, Your Honor.

Q. Let me re-phrase that; I believe Mr. McMahon said to [63] you that, asked you if you testified that the elements must be taken in combination and he related that to the whole Christmas display, is that right? A. I believe so.

Q. And am I right that you indicated that you viewed the nativity scene as a whole but not the Christmas display as a whole, is that right? A. That is correct.

Q. Why do you view those two aspects differently? A. I consider the nativity scene display clearly a religious symbol unlike the other aspects of the display like reindeer and wishing wells and everything else.

Q. Now you also indicated that you viewed the birth of Christ as an historical fact, is that right? A. Yes, it is.

Q. Do you view the nativity scene and what it signifies to you as a historical fact?

MR. McMAHON: Objection.

THE COURT: Overruled.

A. I have, no, I do not. I do not view it as a historical fact.

Q. Mr. Brown, the communications you received from people that you've already testified to and the telephone calls and the letters that you put out, did the views people expressed in those pertain to the nativity scene [64] or the suit or both?

Mr. McMahon: Objection.

The Court: No, he was asked on cross was it not a fact that they objected to the lawsuit. Go ahead, overruled.

A. Both. There were objections that we had filed the lawsuit and also the opinion expressed that the city had a right and the people had a right to have the city sponsor and put up a nativity scene display.

Miss Blanding: I have no further questions, Your Honor.

The Court: Anything further, Mr. McMahon?

Mr. McMahon: No, Your Honor.

(Witness excused.)

GUY DUFAULT

having been first duly sworn, testified as follows:

Examination By Miss Blanding

Q. (By Miss Blanding) Mr. Dufault, are you employed by the City of Pawtucket? A. Yes.

Q. And in what capacity are you employed? A. Director of Parks and Recreation.

Q. How long have you been the director of Parks and Recreation? A. Since April 7, 1980.

[65] Q. What are your duties as the Director? A. I have the development, maintenance and operation and programs for all of the city's park system and their recreational activities.

Q. As the Director of Parks and Recreation do you supervise or become involved in any way with the erection of the Christmas display? A. Yes.

Q. By the city? A. Yes.

Q. And what is the extent of your involvement? A. I would give directives to maintenance staff to erect and also take down that particular display. I would also contact or make initial contact with the vendors as to the different type of things that we would need.

Q. To purchase you mean? A. Yes.

Q. And did you become so involved in the display that was put up in 1980? A. Yes.

Q. And when was that display erected? A. The actual erection started approximately the first week in November and concluded on December 5th.

Q. And that display included the display we've been talking about in Hodginson Park? [66] A. Yes.

Q. And the nativity set which is a part of that display? A. Yes.

Q. Who designed the layout of the display in Hodginson Park? A. The maintenance supervisor to, who's a foreman under my direction.

Q. And did you finally approve that? A. Yes.

Q. And are the individuals who were employed to erect the display under your supervision? A. Yes.

Q. How many individuals were employed in erecting that display in Hodginson Park? A. It varied at different times, I would say up to 20 different individuals were involved.

Q. When you say up to 20 individuals I'm not sure what you mean. A. Certain days certain individuals, depending on the priorities of the day, would be shifted to other portions of the city to work on parks and recreation type of facilities. Certain individuals have a particular expertise such as the electrician would be doing the electrical work when we had the lights working, carpenters would be erecting certain parts of [67] Santa's stand, that type of thing.

Q. Do you know how many hours or how many people went into the erection of the nativity set? A. I have that ex-

actly. For the set up and breakdown of the display we had approximately 600 hours of total service.

Q. Are you referring to the entire Christmas display in Hodginson Park, is that right? A. As well as City Hall, the ice rink and the carousel where we also have displays put up.

Q. Do you know how many city employees worked on the nativity scene itself? A. It would take approximately, I don't know which of the particular individuals did do that, it takes two individuals about an hour to set it up.

Q. Okay, where is the nativity scene stored?

THE COURT: I'm not too sure I have this clearly in mind. When you were speaking of the 20 men you were talking of all of the Christmas displays, am I correct, Mr. Dufault?

THE WITNESS: Yes.

THE COURT: Focussing just on the Christmas display in Hodginson Park can you tell me just about, focussing on the nativity scene itself can you tell me about how many hours of the total service went into that [68] erecting and breaking it down?

THE WITNESS: Approximately two hours.

THE COURT: All right, thank you.

Q. Mr. Dufault, you're referring to setting up the figures themselves? A. Yes, and breaking it down.

Q. Okay, how about erecting the stable or the building? A. That includes the stable, it's a prefab building.

Q. And where are those figures and that stable stored? A. At the present time at the Oak Hill tennis court facility in the cellar of that building.

Q. Okay, and how far is that from Hodginson Park? A. Three minutes, five minutes.

Q. And do city workers take the display out of storage and bring it over to Hodginson Park? A. Yes, they do.

THE COURT: Let me ask one question: You say it takes about a couple of hours to put it up and a couple of hours—

THE WITNESS: No, it takes about an hour to put it up and an hour to take it down.

THE COURT: And an hour to take it down—can you tell me how many men it usually involved in doing that?

THE WITNESS: Two usually, they would go over [69] in a truck to Oak Hill, pick it up and bring it down, set up the figurines. The building itself has three different panels that fold out and then they just sprinkle hay around the display itself.

THE COURT: Thank you very much.

Q. And do you know how long it took the maintenance supervisor to design the layout of that display? A. I really can't say that because the display moved from Slater Park in 1972 and they had set up a formula or a format for that. I'm sure they followed that same particular format as they have in previous years so I can't really give you an honest answer as to what it was when they originally laid it out in 1973.

Q. And there is lighting on the nativity scene also, is there not? A. Yes.

Q. And who sets up the lighting? A. The electrician would as a member of my staff.

Q. And he's a city employee? A. Yes.

THE COURT: How much time does it usually take him?

THE WITNESS: It's very difficult to say, Judge, because of the fact that he runs all of the electrical wires together for all of the various [70] different elements that are involved such as the lighting for the trees and we also put spotlights on Santa Claus and the reindeers and we have a talking wishing well which all have electricity so it's very difficult to pinpoint the exact amount of time that he would use for that particular portion. It happens to be two spotlights and there are twelve spotlights within the display as well as the lighting that goes on both sides of the river which encompasses, I would say, total electrician's time would be somewhere around 40 hours for the entire display with the bulk of that being in the lighting of the Christmas trees themselves. It's very time consuming.

THE COURT: In other words, out of twelve spotlights two focus on the nativity scene?

THE WITNESS: Yes.

THE COURT: And that's the extent of his work.

THE WITNESS: Yes.

Q. Has the city done any maintenance work on the nativity scene? A. No, outside of the fact that the building was crumbling and we did support it with some sticks, hockey sticks.

Q. Does the city own the nativity scene? A. Yes.

Q. Now you were asked to bring with you certain records [71] today, the originals of any and all documents, reports, correspondence, memorandum, records or other writings concerning or relating to the production, ownership, erection, storage, maintenance, dismantling, support or design of the Christmas display including the nativity scene, did you bring those records with you? A. I believe those records, you have them already as part of the total package that we gave. Anything that we would have on that would be from the Finance Department.

Q. And that was going to be my next question, so all the records that were produced were not in your possession but were in the possession of the Finance Department, is that right? A. That's a true statement.

THE COURT: Did I understand you to say that this nativity scene has not required maintenance such as painting or repairing or anything of that kind?

THE WITNESS: That is definitely true.

THE COURT: For how many years would you say that's been true?

THE WITNESS: Since it was purchased in 1973. This particular set was purchased in '73.

THE COURT: Okay.

Q. Do city workers also—

THE COURT: May I, I just want to be precise, [72] do you know what the cost was to purchase this nativity scene?

THE WITNESS: Yes, I do. The nativity scene was purchased on September 26, 1973 at a cost of $1,365.

THE COURT: September 26, 197—

THE WITNESS: 1973.

THE COURT: And how much was it?

THE WITNESS: $1,365.

THE COURT: $1,365, all right, thank you very much.

Q. Now, is the Christmas display and the nativity scene lit in the evenings? A. Yes.

Q. During what hours is it lit? A. It's on a timer system, it would basically go on sometime around 5:15 and would go off at approximately 10:30.

Q. Do you know who pays for the electricity? A. The Old Slater Mill Association receives a bill, the City of Pawtucket pays the difference in that particular bill as to what it was before we went down there. If I can clarify that further; before we went to Hodginson Park they had a certain amount of money on their electric bill, when we went into the park the [73] difference in the price, because of the fact that we were having a display that featured electrical type of equipment, we have picked up the difference, the City of Pawtucket has done that.

Q. And when is the display dismantled? A. Usually the day after New Year's we would start to dismantle it.

Q. Is that when it was dismantled this year? A. No.

Q. When was it dismantled this year? A. We started the Monday after because New Year's fell on a Thursday, we did not start on Friday and we started taking some portions of it down on that Monday.

Q. And when was the nativity scene dismantled? A. I'm not exactly sure.

Q. Don't you supervise the people that do it? A. I do not get out into the field to that extent, no.

Q. How do you know that it takes two people an hour to put it up? A. Because I asked my foreman about that.

Q. And what responsibility does your foreman have towards this? A. He's the person who's directly on site in charge of the set-up out there.

Q. What's his name? [74] A. Robert Schrum.

Q. And it was dismantled by city employees also, correct? A. Yes.

Q. Mr. Dufault, do you have any time records that would indicate how much time your employees spent on various aspects of the display? A. No, we have a total time sheet of all their working activities for the week and that would be used as a mode for payment, pay roll payment.

Q. Do you know if any overtime work was put in on the display? A. I know of two particular areas of overtime that were generally directed to the display, yes.

Q. And what were those? A. One was a parks and recreation employee who posed as Santa Claus to pass out candy to the children, he did have overtime paid to him, he is normally a zoo attendant, and also to a parks and recreation employee who played a clown during our carousel display. And what her purpose was was to keep the children happy while they were waiting for Santa Claus to pass out the candy.

Q. What arrangement does the city have with the owners of Hodginson Park to use that park for a Christmas display? A. Well, our arrangement, as you know they have given us [75] permission to go on to the land, it is strictly a verbal one, there is no written communication per se. What we do normally and the procedure I followed this year in setting it up was to set up a meeting with the Mayor's administrative aide and the Mayor to find out exactly what timetable we would use as far as setting up the display, and such time as they gave me a directive timewise to put up and then communicated with both Slater Mill Association to tell them we would be going on the property at such and such a time to start the actual erection of the display.

Q. You have no written agreement to your knowledge? A. No.

Q. The city with Slater Mill? A. There is none to my knowledge.

Q. And do you know if there's any agreement as to who would be liable if someone was injured while viewing the display? A. I don't know the answer to that question.

(Pause)

THE WITNESS: It seems to be the purchase office that we would normally use for the purpose for purchasing of, something that we would buy, in particular in this case it's the nativity scene and the animals for the nativity scene.

[76] Q. These purchase orders, the prices which you gave the Court for the nativity scene came from? A. I'll tell you in a second when I check the purchase order numbers and we'll see.

(Pause)

THE WITNESS: Yes, it is.

THE COURT: Do those purchase orders, Mr. Dufault, in any way modify your answer that it cost $1,365 in 1973 and that's what the city paid?

THE WITNESS: Unless my addition is wrong, Your Honor, I would stand by that.

THE COURT: In other words, that's included in what you told me.

THE WITNESS: That is what I told you, the 1,365.

MR. McMAHON: That is correct, Your Honor, there's an item on here for garland which presumably has nothing to do with—

MISS BLANDING: I'd like these marked, please, as Plaintiff's Exhibit 5.

THE COURT: Are all those purchase orders part of the $1,365, Counsellor?

MISS BLANDING: No, Your Honor, those are just purchase orders.

MR. McMAHON: Excuse me, Your Honor, I believe [77] there are copies there, could we substitute copies for originals?

THE COURT: Any objection to doing that?

MISS BLANDING: No.

THE COURT: Certainly, withdraw them at the recess and put the copies in.

MR. McMAHON: Fine, Your Honor.

Q. I'd like to just clarify something. There are two separate purchase orders in Plaintiff's Exhibit 5, one of them says "life size nativity scene to include manger and fencing only, animals not included" and this says "animals for nativity scene." Those two purchase orders are both for the nativity scene, is that right? A. Yes.

Q. I'm going to ask you if you can identify these, not the specific items on them, what these are? A. Okay, they all have the 355 account number—these are all purchase orders that were made under the 355 line item which were within our budget code is for the Christmas celebration.

Q. If purchases were made regarding the Christmas display would you have knowledge of what those purchases were for? A. Yes.

MISS BLANDING: I would ask that they be [78] marked for identification in order that I may question the witness on them.

THE COURT: For identification they can, of course, be marked. My question to you is that if none of those invoices represent purchases for the nativity scene itself then why are you introducing them?

MISS BLANDING: Your Honor, that's precisely why I want them marked because I can't tell from some of them.

THE COURT: Well, all right, fine, then we'll mark them for identification.

THE CLERK: Plaintiff's Exhibit 7.

(Plaintiff's Exhibit 7 marked for identification.)

Q. Mr. Dufault, I would show you an invoice for spotlight holders, would you tell me whether those spotlight holders were used? A. Those were for the twelve spotlights that were at the display at Hodginson Park.

Q. That would include the two that were used for the nativity scene? A. Yes.

THE COURT: Can you hear, Counsellor, all right, Mr. McMahon?

MR. McMAHON: I can at the moment, Your Honor; [79] if I can't I'll let you know. If I can, Your Honor, I think anyone can.

THE COURT: Well, okay, I'm not far behind so go ahead.

Q. I would show you an invoice dated December 26, 1979 for spotlight bulbs, 100 watt less 40 percent, ask you what those bulbs were used for? A. I would assume they would be for the spotlights that we would have at the various different Christmas displays.

Q. And that would include the nativity scene display? A. At least two of them, yes.

Q. I would show you another invoice dated December 15, 1978, for stakes required for the Christmas display and lists a number of 10 watt bulbs, also spotlight holders and floodlight bulbs 150 watts and friction tape, would any of those be used for the nativity display? A. I was not the director at the time of these, I would assume from reading this display, I would assume that they were used for the Christmas display per se but I really can't say because I wasn't present at that time.

Q. When did you begin working in the department? A. April 7, 1980.

Q. Before that you were not employed at all in the [80] Department of Recreations? A. For the City of Pawtucket, that's right.

Q. Now I believe you testified that the electrical work in stringing electrical lights was all done by city employees on the Christmas display, is that right? A. The electrical lights themselves?

Q. Putting up the electrical light system. A. Yes.

Q. That was done by city employees? A. Yes.

Q. Do you know if that was also the case in prior years? A. I cannot say that, I'm not sure.

MISS BLANDING: I would ask that the two invoices which the witness testified were related to spotlight holders and spotlight bulbs used for the entire Christmas display including the nativity scene be admitted as a full exhibit.

MR. McMAHON: Well, Your Honor, if I heard the testimony correctly it was in part, I think, of course, I object to it going in piecemeal, I think it should all go in, but I won't object to this.

THE COURT: Mark it as a full exhibit.

(Invoices marked Plaintiff's Exhibits full.)

MISS BLANDING: I have no further questions, Your Honor.

[81] THE COURT: Do you want to question now or would you rather reserve your right to call him as part of your own case and question him then, you have the choice.

MR. McMAHON: I leave it entirely to Your Honor's convenience.

THE COURT: No, I leave it up to you.

MR. McMAHON: Either way. Well, it nobody has objection we might as well do it, the witness is on the stand. Some of the testimony has come in already and some of it would be by way of explanation.

THE COURT: Whatever you want to do.

Examination By Mr. McMahon

XQ. (By Mr. McMahon) Mr. Dufault, for sense of precision in the record will you spell Hodgson Park, please? A. Hodgson Park is H-O-D-G-S-O-N—Boatery Park is the official title.

XQ. Before you became Director of Parks and Recreation for the City of Pawtucket what was your position? A. Deputy Director of Parks and Recreation in the City of Warwick.

XQ. And how long were you in that position? A. Two years.

XQ. Now His Honor questioned you concerning the work done by the electrician. I believe you said the electrician [82] devoted a total of 40 hours, is that correct? A. Approximately.

XQ. Approximately how many total lights are involved in the Hodgson Park display? A. Bulbs or light sets, there's about 3440 bulbs within the light sets, there's strings of 25 and there's 132 sets of lights.

XQ. That's in addition to the twelve spotlights? A. Yes.

XQ. And there is also a electrical hook-up, is there not, in the wishing well? A. Yes, there is.

THE COURT: You're going a little fast. 132 sets of lights, each set has how many bulbs?

THE WITNESS: 25.

THE COURT: Now are we speaking, Mr. Dufault, of all the displays or just the one that has the nativity scene?

THE WITNESS: That's the total citywide display.

THE COURT: That includes the City Hall and the carousel and all the rest of it?

THE WITNESS: Yes.

THE COURT: Okay. Let's focus on the display of which the nativity scene is a part of, how many [83] total sets of lights do you have there?

THE WITNESS: I don't know exactly, Your Honor, I'll say about 100 sets of lights.

THE COURT: And how many of those lights are used for the nativity scene?

THE WITNESS: Two spotlights.

THE COURT: Is that all?

THE WITNESS: That is all.

THE COURT: Okay, thank you.

XQ. And those 100 sets are 25 lights each? A. Yes.

XQ. So that's 2500 lights approximately plus 12 spotlights? A. That is correct.

XQ. Now would you please describe generally the electrical work involved in the wishing well? A. One of the components of our annual Christmas display is to have a talking wishing well. What we do is we set up a sound truck and we have it lit obviously with spotlights so people can maneuver themselves to the wishing well. The children talk into the wishing well and we have a person in the sound truck who relates sounds back to them, usually appropriate.

XQ. Now does the setting up—

THE COURT: What do you mean by "usually appropriate"?

[84] (Laughter)

THE WITNESS: Sometimes he gets carried away and starts singing Christmas carols in spite of the people but that's his own particular quirk.

THE COURT: Adds a little zest.

THE WITNESS: Yes.

XQ. Now Mr. Dufault, do you know approximately the total expenditure in employee services at Hodgson Park for the 1980 Christmas display? A. I don't have the exact figure for Hodgson Park alone. I would think that, if I could place a percentage on it which I don't know if I can or not, it would be about three quarters of the total expenditure would be related to Hodgson Park. The total expenditure was $6,146 so I would assume about 75 percent of that total would be directly related to the Hodgson Park display. I don't know what that would be.

THE COURT: Let's set a figure. Give us an approximation, we realize you can't entirely.

THE WITNESS: I would say it would be around $4500.

XQ. And of that do you know how much cost relates specifically to the nativity scene? A. Yes, I think so.

XQ. And what is that figure?

[85] MR. DeLUCA: Your Honor, I object.

THE COURT: No, overruled.

A. I would say that the income services of the two gentlemen taking their approximately two hours, an hour of set up and an hour of breakdown, would be around $20.00.

THE COURT: So that of $4,500 your testimony is that approximately $20.00 can be apportioned as the cost for the nativity scene?

THE WITNESS: Yes.

XQ. Now Mr. Dufault, you were asked by Miss Blanding concerning the cost of the figures in the nativity scene. Do you know the cost of all of the lights, approximate cost of all of the lights at Hodgson Park? A. The figure is difficult to determine exactly because of the fact that we purchased them over a series of years. We have an ongoing renewal process where we purchase at least ten sets of lights every year. The cost of the light sets this year were $8.35 apiece. Going back through the records from ten years ago the price was about $4.10. If we could average a per unit cost I'd say somewhere, we'd probably average around six or seven dollars per set so I would say for the actual light sets would be about $800 and for the bulbs to go into those sets would be approximately the same. [86] I would say the value would be a cost to the city over the years at around $1600, $1700.

THE COURT: This is just for the lights now, is that correct?

THE WITNESS: Yes.

THE COURT: And this is just for Hodgson Park?

THE WITNESS: No, that's the total display. Again we go back to that maybe a 75 percent figure.

THE COURT: So give me a figure.

THE WITNESS: Testing my math, $1300 I would say approximately, somewhere around there.

THE COURT: It costs the city for lights at Hodgson about $1300. That's not a running cost each year though, is it?

THE WITNESS: No, no, that's the cost for the total amount of the lights over the past ten years. The actual, the

annual expense I would say would run for wire, replacement, spotlight holders which we have to get on a constant basis, refurbishing of light bulbs which is a constant problem through theft, would be somewhere around four, five hundred dollars annually.

THE COURT: Approximately four to five hundred dollars annually.

THE WITNESS: Yes.

THE COURT: We're still talking of Hodgson [87] Park.

THE WITNESS: Yes.

XQ. But the evidence you've presented with respect to the costs of the nativity scene was a purchase made in 1973, correct? A. Yes.

XQ. And there have been no purchases with respect to the nativity scene except for the spotlights since 1973, is that correct? A. That is correct.

XQ. Do you know the cost of the other elements of the Hodgson Park display? A. I have original purchase prices on some of them, yes. An example would be on the east bank of the river the display is on both sides of the river, Blackstone River, which separates Hodgson Park. We have Disney or character cutouts, wooden cutouts, those particular cutouts feature various different things, Disney characters, some Christmas symbols, trees, etc. The value of those would be approximately $150 apiece at the present time if we were to try to purchase that same type of thing.

XQ. Excuse me, $150 apiece, and how many figures are there? A. There are 21 wooden cutouts on the far side of the river. We also have within the display itself which [88] would be located on the west bank of the river, which is the same side as the nativity scene, we would have Santa and his sleigh with the reindeer and the original value of that particular piece was $1,458. We have a Canterbury musical group wich is a piece that's located on the Main Street end of Hodgson Park that cost $1,490. We have a small village made up of five different com-

ponents, four houses and a church, and the original value of the village is $1,250. The wishing well was originally built in house and cost us approximately $50 of materials and Santa's house in which he's located while he passes out the candy cost the city approximately $200 in lumber costs and we did that. We also have a series of variety of ornaments that are located there. Three Christmas trees that are lit that cost $280 originally. We also have some stars that are lit, there's three stars in particular, that cost was approximately $100 apiece and then we have garland, things of that nature which would probably be somewhere around $100.

XQ. Now as part of your responsibility have you determined the market value of the various elements in the display? A. Yes, I have.

XQ. Present market value? A. Yes.

[89] XQ. What's the present market value of the nativity scene?

MR. DeLUCA: Objection.

THE COURT: Overruled.

A. $200.

XQ. And what is the market value of all of the other elements in the Hodgson Park display exclusive of the lights?

MR. DeLUCA: Objection.

THE COURT: Overruled.

A. Running down them right now the Disney characters or wooden cutouts on the far side presently are worth $125 apiece. The stars are worth $40. The Santa, sleigh and reindeer is approximately worth $900. The Canterbury musical group is worth $600. The village is worth $400 and the wishing well and Santa's house have continued to keep their same value, 50 and 200 respectively.

XQ. So the total value of the display exclusive of the lights is approximately what, Mr. Dufault? A. At the present time I would say that would be totalwise approximately $2800 to $3,000.

XQ. And that includes the figure for the nativity scene which I believe you testified was what? A. $200. That figure is exclusive of the wooden cutouts which also has a, the total actually would be [90] approximately $5,000 including those cutouts.

XQ. Well, will you explain why you have excluded, why you have treated those cutouts separately? A. The wooden cuts were done in house by the city. They were not purchased from an outside vendor. That's a product that we ourselves would make up and have people within our own house paint and do of artistic value. Some appraising them separately, the other appraisals were done by a person, a display company that we have done business with in the purchase of the other various components.

XQ. So that the total value was approximately $5,000 of which the nativity scene is approximately 200? A. Yes.

XQ. Now Mr. Dufault, would you please describe for the Court the Hodgson Park area in terms of its interior, dimensions and terms of its location in the city? A. Hodgson Park is a passive park which is part of the old Slater Mill complex which houses Wilkinson Mill and Slater Mill. The park itself is divided by the Blackstone River, it's approximately 40,000 square feet with 21,000 on the east bank and 19,000 on the west bank. It's bordered by Main Street, Roosevelt Avenue and on the far side it would be bordered by Broadway. It's located in probably what is considered the middle [91] of the commercial district in Pawtucket.

XQ. Do you have the dimensions of that part of the area which is covered by the Christmas display, the entire Christmas display? A. That would be 39,767 square feet.

XQ. How much of that is occupied by the nativity scene? A. I don't follow your question. Actually the square footage—

XQ. The square footage in the area covered by the nativity scene? A. The nativity scene would cover approximately 140 square feet.

XQ. Out of how many? A. 39,767.

THE COURT: Give me that figure again as to the nativity scene.

THE WITNESS: It's about 140 square feet, it's a 10 by 14 exhibit.

XQ. Now Mr. Dufault, did you direct that certain photographs be taken of the Hodgson Park area at the time the Christmas display was in place? A. Yes.

XQ. And that includes the photograph which is Defendant's Exhibit A, does it? A. Yes.

[92] (Pause)

XQ. Mr. Dufault, I show you seven photographs and ask you whether these together with Defendant's Exhibit A were made under your direction? A. Yes, they were.

XQ. And I will ask you whether they constitute a fair and accurate representation of those portions of the Hodgson Park Christmas display which they purport to represent? A. Yes.

MR. McMAHON: Your Honor, I would ask that these be marked as Defendant's Exhibit letter with a sub number because I would like the witness to identify the angle of each of them.

MR. DeLUCA: We have no objection.

THE COURT: Is that number C, Miss Zinni?

THE CLERK: Yes.

THE COURT: All right, mark those C(1), (2), (3) as they fall.

(Photographs marked Defendant's Exhibits C(1) through (7)

XQ. Mr. Dufault, showing you Defendant's Exhibit C(1) I will ask you from what angle this photograph was taken and what portions of the Hodgson Park display is or are represented therein? [93] A. This particular picture was taken across the street, directly across the street on the Roosevelt Avenue side of Hodgson Park taken from an elevated height and seems to encompass about 85 percent, 80 to 85 percent of the total passive park area of Hodgson Park.

XQ. Mr. Dufault, would you please circle in pen the nativity scene?

(Witness marks photograph.)

XQ. Now directing your attention to Defendant's Exhibit C(1), it shows, does it not, the Blackstone River running through Hodgson Park, is that correct? A. Yes, it does.

XQ. And the square footage figures which you gave us are the figures embracing only both sides of the river, it does not include the area of the river itself? A. That is correct.

XQ. Now looking to the upper, slightly above the center of Exhibit C(1) on the other side of the river, I will ask you to describe the portion of the Christmas display which are shown on the far side of the river? A. There are 21 wooden cutouts on the far side portraying various different things and beings. Also on the far side of the river is the season's greetings which are a series of individually cut out letters that are painted in a fluorescent coloring with a Santa Claus between [94] the seasons and the greetings. They're placed on the wall facing the Roosevelt Avenue side. Also on the far side of the river is a series or string of lights on the trees that are located in the upper right-hand corner of this particular photo.

XQ. What are the dimensions of the season's greetings which is on the wall? A. Season's greetings, each of the individual letters are four foot high, two foot in width and spans a length of forty-eight feet.

XQ. And this is on the river wall? A. That's right on the river wall on the east bank. The individual wooden cutouts are approximately four foot high and they're placed on metal stakes which are driven into the ground and they are attached to those particular stakes. They all face, again they face the Roosevelt Avenue side.

XQ. Now in Exhibit C(1) to the right of the circle you have placed on the photograph there is a large treet. I will ask you whether that is a natural part of Hodgson Park or whether it is brought in for the Christmas display? A. That was a 40 foot blue spruce tree that was brought in as is brought in in years

past from an outside site. It was donated to the city by a citizen.

[95] XQ. And is that lighted in the evening? A. Yes, it is.

XQ. So that that is not part of the natural site but rather is an artificial part of the Christmas display? A. It's part of the display, that's right.

XQ. Now referring to Exhibit C(2), I will ask you to describe the vantage point from which that photograph is taken and how much of the display it encompasses? A. This particular picture was taken from Main Street again from an elevated height looking down, basically down the middle of the Blackstone River. It encompasses, as I see it, it seems to encompass about 98 percent of the actual passive park area in Hodgson Park.

XQ. And I will ask you on that exhibit if you would please circle the nativity scene?

(Witness marks exhibit.)

XQ. And with respect to Exhibit 3-C I will ask you to describe where that was taken from and what it encompasses? A. That particular picture was taken from a building on the corner of Roosevelt Avenue and Main Street at the same angle that the night time picture was taken from before and that particular picture seems to also encompass about 99 percent of the Hodgson Park area.

XQ. But in this particular photograph because of the angle [96] from which it is taken the nativity scene is blocked, is that correct? A. That is correct.

XQ. With respect to the portion of Hodgson Park on the western side, which I believe is the westerly side of the display on the Roosevelt Avenue side, are those portions, are those the main entrances to the display itself, people who go into the display? A. Yes.

XQ. And with reference to Exhibit C(3), would you please circle the steps which constitute the entrances to the display? A. In this particular picture there is only one set of steps evident, the northern steps down Roosevelt Avenue are

not. They would be located right in the corner of the Peerless building but I can pinpoint the southern.

(Pause)

XQ. Okay, on Exhibit C(3) would you please circle the steps which appear on that photograph?

(Witness marks photograph.)

XQ. And that is one of the two entrances to the display? A. That's correct.

THE COURT: These are all aerial photographs, aren't they?

[97] THE WITNESS: They're actually taken from building tops, the majority of them.

THE COURT: I mean the reason for asking the question, this isn't really the perspective a pedestrian would have of that particular area, is that correct?

THE WITNESS: That is a correct assumption.

THE COURT: Yes, all right.

XQ. But referring to Exhibit C(3) and the steps you have indicated as one of the entrances, going down those steps what would be the visitor's angle or view of the nativity scene? A. Going down the steps you would not be able to see it because it would be blocked by the spruce Christmas tree.

XQ. So that one standing on Roosevelt Avenue in the area of those steps would be blocked by the Christmas tree as far as the nativity scene is concerned? A. That is true.

XQ. And the fact of the matter is that one's viewpoint of the nativity scene from any angle depends upon where the individual happens to be standing with respect to the display, isn't that so? A. Yes.

XQ. Showing you Exhibit C(4) I will ask you the same question with respect to the angle from which that photograph is taken, what it depicts in the display? [98] A. The angle is from the corner of Roosevelt Avenue and Main Street and it is an elevated photo with a partial corner of the nativity scene shown in that particular picture.

XQ. And on that photograph, on that Exhibit C(4) would you please circle the nativity scene?

(Witness marks photograph.)

XQ. With respect to Exhibit C(5) I will ask you the same question as to angle and content? A. This picture was taken at ground level from the Broadway side which is on the east side of the river facing towards the Peerless building or Roosevelt Avenue area. In this particular photo we were shooting directly from ground level on the far side of the river.

XQ. And I will ask you whether Exhibit C(5) shows the second entrance of the steps which did not appear on the exhibit you have previously marked as being an entrance? A. Yes, it does.

XQ. And would you please circle on that exhibit the second set of steps?

(Witness marks photograph.)

XQ. Just for clarification, this was not taken from an elevated height I believe? A. That's correct.

[99] XQ. Unlike some of the others. Okay, with respect to Exhibit C(6) will you also describe the angle and content? A. This was taken from the actual level of the west bank of Hodgson Park and it is approximately five to six steps into the park after you go down the steps that are located at the Main Street-Roosevelt Avenue end of Hodgson Park.

XQ. And approximately what portion percentagewise of the total display is shown here? A. Of the total display or just the west bank?

XQ. The Hodgson Park display, total Hodgson Park display. A. I would say probably 30 or 40 percent.

XQ. Now with respect to Exhibit C(7) I will ask you again the same question with respect to angle and content? A. This picture was taken about five to six feet to the right of the steps at the corner of Main Street and Roosevelt Avenue and was taken from the level before you enter the actual Hodgson Park, it's taken at the above level which would be the Roosevelt Avenue level of that particular picture.

XQ. And approximately what percentage of the total display is shown in that exhibit? A. That would include about 45 percent of the actual exhibit.

[100] XQ. Now Mr. Dufault, do you know the dimensions of the various figures in the entire Hodgson Park exhibit? A. Yes.

XQ. Would you please in any order give us the dimensions and describe the particular item and give us the dimension of each? A. On the west bank of the river the first item upon entering from the City Hall side of Roosevelt Avenue entrance you run into the wishing well which has a height of 7 feet and a width of 5½ feet. From there you would move to Santa's house which has a height of 14 feet, it's 11 foot wide and 14 foot in length. You would then run into the various stars which are four foot point to point. You have three Christmas trees that are located along the river on the west bank which is 11 feet high and 7½ feet wide.

XQ. May I interrupt you there. Those are artificial Christmas trees? A. Artificial Christmas trees, that's correct.

XQ. What are they made of, wood? A. Wood. Then you have the nativity scene which encompasses a space of 14 foot by 10 foot, has figurines anywhere from 12 inches to 5 foot high and we have the actual blue spruce Christmas tree which is approximately 40 foot high. The village which is a series of buildings [101] that are 2½ feet high by a foot and a half wide. Canterbury musical group which has an elevation of 6 foot and encompasses a space of about 8 by 8. The largest item on that particular side of the river as far as length is Santa and his sleigh and the reindeer which is approximately 25 foot long and raises to a height of 15 feet, the highest reindeer. On the opposite side of the river the Disney characters are 4 foot high and the season's greetings that I mentioned earlier are 4 foot high individually, 2 foot wide and it encompasses 48 foot in length along the bank of the river.

XQ. Now will you focus on the nativity scene, then give us the dimensions of the figures that pertain in there? A. The nativity scene was made up of a small crib which is about 6 inches off the ground, there is a fence around that, that's approximately 8 foot and a shack that's about 4½ foot high. There is a boy approximately 12 inches long, man, a woman that are in a kneeling position approximately 2½ to 3 foot high. There are three kings, one is 3 foot, one is 4 foot, one is 5 foot. Three shepherds in a kneeling position all approximately 3½ foot. A cow, mule, two camels and two sheep which are all about 2 foot and two angels, one angel is approximately 12 inches and [102] the other one is approximately 3 foot and they are the components of the nativity scene.

XQ. Are there any ceremonies, public ceremonies held in the Hodgson Park display during the Christmas season? A. The opening of the park and the actual lighting of City Hall and Hodgson park takes place in a small ceremony each year.

XQ. Is that the only ceremony during the Christmas season at Hodgson Park? A. Yes.

XQ. When does that occur? A. That would occur at the opening of the lights which this year was December 5, 1980. The celebration actually takes place with Santa Claus arriving on the back of a fire truck after touring the city and then Santa Claus and the Mayor of the city go to the main power switch at which time they put on the lights to Hodgson Park. Santa Claus then assumes a position in his house and the talking well starts up and the various children of the city would then receive candy from Santa Claus and talk into the wishing well.

XQ. Is that the entire ceremony? A. That is the entire ceremony.

XQ. Now I believe you testified, Mr. Dufault, concerning other portions of the city's Christmas display other [103] than Hodgson Park. Would you very briefly describe those? A. There are four components with Hodgson Park being one. The second is the carousel exhibit that we have in

Slater Park. What we do is we decorate the carousel with a small lighting display and on the three Sundays previous to Christmas we have free carousel rides for all the children as well as Santa Claus set up so that the children can receive candy from him and that would take place on all three of those particular Sundays before Christmas time. The third component would be the City Hall celebration where we have a caroling session and a Christmas party in the hall as well as the interior of the building being decorated, each of the various different people that work in City Hall receive a plant from the Department of Parks and Recreation usually pertinent to the Christmas season. The fourth component is a Christmas party at the ice arena for mentally retarded children where we have Santa Claus, who is a city employee, come forward and pass out candy to the various different kids and we also decorate the ice rink with a small Christmas tree and some lights for that occasion.

XQ. How far is the City Hall property from the Hodgson Park property approximately? [104] A. About 295 feet.

XQ. And is the City Hall display in any way tied into the Hodgson Park display? A. It's tied in by the fact that we put it all together ourselves, yes. The lighting would be placed on at the same time as the actual Hodgson Park display. The actual tying in of the two would be the fact that we do tie in the initial ceremonies of putting the lights on together with those two, yes.

XQ. Is a single sound system used for both? A. Yes.

XQ. It's the identical system? A. It's the same exact system.

XQ. Does the city also participate in the erection and maintenance of a Christmas tree at the foot of the mall on Main Street? A. At the present time we are storing that tree. We took it down approximately I would say at this time three weeks ago. Members of the Parks and Recreation Department maintenance staff took down that particular tree and it's presently being stored at McCoy Stadium which is one of the recreational facilities under my aegis.

XQ. Who owns that tree? A. I believe it's owned by the Downtown Mall Merchants [105] Association.

XQ. How far is that tree from the Hodgson Park property? A. It would be approximately 285 feet.

XQ. Just briefly, Mr. Dufault, does your department participate in, as a matter of city policy in other holiday celebrations than Christmas? A. Yes, we do. During the July 4th or July 3rd night the City Council directs the fireworks display that is done. The Department of Parks and Recreation actively oversees the firing of those particular fireworks to the extent that our people would tell them where to set up their equipment and where to dig, etc.

XQ. Do you know the approximate costs of the 4th of July fireworks display? A. $3500.

XQ. And do you have knowledge of city sponsorship of other national holiday celebrations during the year? A. I believe the city would also participate in, I know they participate in some of the Veterans parades, I'm not exactly sure to the extent that they do.

XQ. Those other holiday celebrations would not be within your jurisdiction? A. That is correct.

MR. McMAHON: No further questions, Your Honor.

[106] *Further Examination By Miss Blanding*

Q. (By Miss Blanding) Mr. Dufault, I believe on direct examination you testified when I was showing you the invoices which have been marked for identification for plaintiff that you had no knowledge of whether any of those lights or light fixtures or anything pertaining to electricity for years prior to 1980 were used for the Christmas display, did you not? A. I had no direct knowledge of that, that's true.

Q. But on cross examination didn't you testify that the total cost of the lights was approximately $1300 from Hodgson Park and that those lights had been purchased over a period of ten years and that now that the annual cost to the city for light fix-

tures and lights is approximately four to five hundred dollars a year? A. Yes, I had mentioned upon that—

Q. Did you, could you just answer yes or no, did you testify to that on cross examination? A. Repeat the question, please.

(Previous question read back.)

A. I'd like to explain my answer to that.

THE COURT: Yes, you may, of course.

THE WITNESS: Yes, what I had mentioned in the answer was yes, I did testify to that, what I was saying, as I mentioned at that particular point, was [107] that we, because of our reoccurring expenses of fixtures breaking down, getting old, worn out, that we have to replace them, what I was taking, and I have no direct knowledge of the cost between the tenth year and the present year, what I was doing was making an actual unit cost which was an average of the original cost ten years ago with today's cost so I do not have direct knowledge as to the actual cost of that particular item. I do know what this year's cost was.

Q. Didn't you testify that the intial expense to the city for lights which was not repeated annually was approximately $1300 spread out for the several years? A. Over ten years, yes.

Q. And now you're saying you have no direct knowledge of that figure? A. Only in what I just previously explained.

Q. So you're calculating that figure based on what was spent this year in lights? A. And what was spent ten years ago, yes, that's correct, that's a correct assumption.

Q. How do you know what was spent ten years ago? A. I looked it up.

Q. So you took one figure from ten years ago and one figure from this year and from that you assumed a cost over a period of ten years? [108] A. That is correct.

Q. Why didn't you look up the actual expenses over the ten year period so that you could get an actual cost? A. It's very difficult because of the accounting procedures that were in-

volved prior to, and the Finance Director could answer this question better than I, but in asking for the information prior to the 1976 or '77 accounting years there was no line item breakdown individually for that particular item, so it happens that the vendor of ten years ago for the actual Christmas display, I found that one individual purchase item order.

Q. Well, what about the years between 1976 and 1980, couldn't you have looked those up? A. I could have.

Q. But you didn't? A. No.

Q. I'd like to show you these invoices again that were marked Plaintiff's Exhibit 7 for identification. This is an invoice dated December 13, 1978, required for Christmas display, referring to bulbs, spotlight holders, floodlight bulbs and friction tape, you remember I asked you about that previously? A. Yes.

Q. What is the total cost indicated in that? [109] A. It's $1131.57.

Q. And here is another bill invoice dated the same date, December 13, 1978, and it states "10 watt bulbs, green, red and yellow" and may I ask you what the total is on that invoice? A. $548.10.

Q. Here is another invoice dated two weeks earlier, December 1, 1978, for wire, sockets and bulbs, and what is the total cost on that invoice? A. $186.85.

THE COURT: But this pertains to the entire display, does it not?

THE WITNESS: Yes.

THE COURT: The figures.

MISS BLANDING: Yes, Your Honor, but I believe he indicated that the cost for the entire display over a ten year period was only $1300 and then approximately four or five hundred dollars additionally each year to replace bulbs and that would relate obviously to the cost of lighting up the particular area that the nativity scene was in and I am indicating by these that the actual figures which I assume Mr. Dufault could have checked on if he had so chosen indicate a much higher figure just for the last four years.

[110] THE WITNESS: I believe, Your Honor, the original testimony was on present value, we were trying to determine the present value of the lights, not the actual cost to the city. At least that was my assumption.

THE COURT: Be that as it may, the question is whether you're going to be able to make a valid argument to the Court as to the cost of the nativity scene. It's no concern and has no constitutional concept that the City of Pawtucket wants to spend money for a general Christmas display, this is their prerogative.

MISS BLANDING: I understand that, Your Honor.

THE COURT: And whether or not they spend is between the city and its citizens. To put it somewhat crudely but I think very candidly, it's none of our business.

MISS BLANDING: Well, Your Honor, the first exhibit, the first photograph that was entered as defendant's exhibit was a photograph taken at night showing the lights at Hodgson Park. Now Mr. Dufault has testified that only two spots light the nativity scene, however, I was going to question him and I will show that whole area is lit up and you cannot say that only two spotlights light up that nativity scene.

[111] THE COURT: All right, you will have room to argue in your brief, go ahead.

Q. This is an invoice dated August 11, 1978, bulbs, Christmas decorations, and what would be the total figure there? A. $434.80.

Q. The invoice for December 1979 Christmas bulbs and the total figure there? A. $67.20.

Q. This would be an invoice dated November 26, 1979 for bulbs of various colors and what is the total figure there? A. $1149.

Q. There was also an invoice dated January 4, 1979, C & K Electric Company, labor and materials to connect Christmas lights as directed at Slater Mill park, November 27, 1978 through December 8, 1978, what is the total figure there? A. $2946.25.

Q. Now then they say "Slater Mill park" is that Hodgson? A. I believe they're referring to Hodgson Rotary Park, yes.

Q. And you testified previously that in terms of other lighting the cost of lighting Hodgson Park is three quarters of the total lighting cost approximately, did you not? [112] A. I would think so, yes, approximately.

Q. Finally there's an invoice dated December 16, 1980 for Christmas bulbs and the cost there? A. $136.

Q. So that the figures indicated in these invoices just from 1978 to 1980 indicate a much higher figure than you had previously estimated, is that not true? A. I don't know if that assumption could be drawn as to the present value because I just took general figures, I'm not an expert as to what the depreciation would be on something like that. I just used a general figure basis.

Q. I thought your testimony as to lighting was as to cost to the city, not to present value? A. It was to the present value I believe, at least I answered under that assumption.

MISS BLANDING: I'd like this admitted as a full exhibit.

THE COURT: Mr. McMahon.

MR. McMAHON: No objection.

THE COURT: No objection?

MR. McMAHON: Based on the testimony of what they're worth, no objection.

THE COURT: They may be marked. What number, Miss Zinni?

[113] THE CLERK: 7.

(Plaintiff's Exhibit No. 7 marked.)

Q. Mr. Dufault, I'd like to show you Defendant's Exhibit 3 and ask you if you recognize that? A. Yes, I do.

Q. And is that not a picture of the Hodgson Park area with the Christmas display lit at night? A. That is a picture of the west bank of the display, yes.

Q. Did you direct this picture to be taken? A. Yes, I did.

Q. And doesn't this show lighting actually lighting up the whole park area? A. It does.

Q. So that the lighting that's on the Christmas tree and all the other trees surrounding the park and the other figures, that all the lighting actually lights up the whole area including the nativity scene area, is that not correct? A. Including the street lights, yes.

Q. Well, my question I believe was that the lighting that is on all of the trees surrounding the park, on the Christmas tree and on the various figures and the spotlights light up the whole Hodgson Park area including the area in which the nativity scene is, is that correct? [114] That's correct.

Q. Now it's my understanding that you directed the taking of all of these pictures, is that correct? A. Yes.

Q. Why is only one of them in color? A. I don't know the answer to that. We just asked for black and white prints, we wanted a color print of the night time photo obviously for effect.

Q. And was this night time photo also taken from the top of buildings? A. Yes, it was.

Q. I direct your attention to C-1, this is a view from the west side of the Hodgson Park area, is that correct? A. That's correct.

Q. And where does this picture indicate that the nativity scene is located in the whole area? A. I don't understand the question.

Q. Is the nativity scene not located in the center of the park area? A. Lower center, yes.

Q. Are these bus stops right there? A. Yes, they are.

Q. Would you say that it's probable that most of the people that would be viewing this scene would be standing in the area of the bus stops and the street? [115] A. That is a correct assumption, yes.

Q. Not on the tops of buildings? A. That's correct.

Q. And people standing at these bus stops which appear from this picture to be right across from the nativity scene would just have to turn around and the nativity scene would be right in front of them, isn't that correct? A. From those particular two bus stops, yes, they continue on down.

Q. What continues on down? A. There's another section for a bus stop there.

THE COURT: I didn't hear you, what did you say?

THE WITNESS: In other words, there's two bus stops showing here, there's the actual bus stop itself is elongated from that particular picture. In other words, the buses would stop from here all the way back down to the corner of Roosevelt and Main, that's a better picture.

Q. I believe you're referring to C(3)? A. Yes.

Q. Defendant's C(3)? A. Yes.

Q. C(3) indicates that there are only two shelters where [116] people may stand? A. There are only two shelters.

Q. And those two shelters are right across from the nativity scene? A. Yes.

Q. Was there any particular reason for taking these pictures from the top of buildings? A. To get a better view.

Q. But not a better view in terms of who would be viewing the nativity scene in actual fact? A. I don't understand what you mean.

Q. Taking them from tops of buildings would not give you a better view in terms of how passers by and residents would actually see the display? A. That is correct, it gives you a better view of the display but not what you would see from ground level, that's true.

Q. May I ask you, referring again to Defendant's Exhibit C(1), what this construction is and I'm referring to the construction in the left-hand corner of the building that looks like a shelter? A. That's Santa's house.

Q. Santa's house? A. Santa was located, that's polyethylene plastic which protects him from the wind, that's what that particular [117] structure is. He has a chair that's set inside there so that when the children sit on his lap they're protected from the elements to some extent.

Q. Are you aware if during 1980 Christmas season that was used for anything else? A. Not to my knowledge outside of that.

Q. No caroling was conducted from there? A. Not to my knowledge.

Q. Are you aware of the press conference or rally or caroling or whatever that Mayor Lynch held in December of 1980 in Hodgson Park? A. Yes, I'm aware of it.

Q. Where was that conducted from? A. It was located in approximately this area right here.

Q. You mean there was a podium that's not there now? A. Yes.

Q. And that was right in front of the nativity scene? A. Yes.

Q. And would you call caroling a celebration? A. I really have no opinion about that.

Q. Mr. Dufault, when was that podium that you just referred to erected? A. The one for the press conference you're referring to?

Q. Yes. A. The morning of that particular conference.

[118] Q. Was it put up for that purpose? A. Yes.

Q. And when was it taken down? A. Immediately after.

Q. Now you gave a figure of 39,000 plus square feet as the area that the entire Christmas display in Hodgson Park encompassed, is that not right? A. I gave that as the figure of the passive area that is Hodgson Park.

Q. And you compared that to the square footage that was taken up by the nativity scene, is that right? A. Yes.

Q. But the 39,000 plus square feet did not refer only to square feet that were covered by various Christmas displays, did it? A. No.

Q. It refers to the whole Hodgson Park area? A. That's correct.

Q. And actually a great many of those square feet are not covered with anything but grass, is that right? A. That's correct.

Q. So that if you're going to compare the square footage that the nativity scene takes up as opposed to other parts of the display then a fairer comparison would be the square footage actually taken up by each of those [119] other parts of the display, isn't that right? A. I wasn't comparing, I just answered the question as it was stated to me.

Q. You've referred to papers during your testimony? A. Yes.

Q. May I see those papers? A. Sure. Here's a copy of originals, these are just copies.

(Pause)

Q. If I may refer to the papers which you have been referring to labeled "Appendices." A. Yes.

Q. Did you compute the figures for this? A. Did I compute the figures, was that the question?

Q. Who composed this? A. I did.

Q. You did, okay, and this paper indicates under In Time Services a watchman? A. Yes.

Q. Could you tell me when there was a watchman guarding the Christmas display? A. Seven days a week upon the lighting of the display on December 5th. Upon the set-up of display and the actual lighting of the display on the 5th for second shift coverage seven days a week we put a watchman on to oversee the actual operation, make sure the lights [120] went on, make sure there was no theft of bulbs, etc., general vandalism protection.

Q. This indicates there was a watchman there for two shifts? A. Yes.

Q. What hours would the watchman be there? A. The way we have it set up they would work four to midnight and midnight to eight.

Q. How about during the day? A. During the day they would have general workers that are part of the park attendants staff there.

Q. Would they be there specifically to guard the nativity scene and the Christmas display? A. Not really, they would be there replacing bulbs, sometimes replacing broken wires, sometimes there would be no coverage at all there. That would be on a day time coverage of the display was basically a reactionary one.

Q. Reactionary to what? A. To broken bulbs, bulbs that were stolen, etc.

Q. And these watchmen were there for four weeks? A. Approximately, yes.

Q. Is there always a watchman on the Hodgson Park Christmas display and in the prior years has there been? A. I don't know.

[121] Q. The total cost for the watchmen this year excluding whoever was there during the day by your figures was $2,240, is that right? A. Approximately, yes. Certain individuals make more money than others because of longevity pay, etc.

Q. These individuals were city employees? A. Yes, they were.

Q. I believe in response to some questions that Mr. McMahon asked you you indicated the fair market value of several different items in the display including the nativity scene, is that right? A. Yes.

Q. How did you arrive at those fair market values? A. The person that we originally bought the display from was Purist Display Company, I had the representative of Purist Display down to evaluate the cost of the present display. He was the one, those figures are actually derived from his quotes.

Q. Are they his quotes? A. Yes.

MISS BLANDING: I have no further questions, Your Honor.

Re-Examination By Mr. McMahon

XQ. (By Mr. McMahon) Just very briefly, referring to, Defendant's Exhibit A, Mr. Dufault, it shows the [122] lighting only on the west side of the river, is that correct? A. That is correct.

XQ. There is similar lighting in the trees on the west bank of the river, correct? A. Yes.

XQ. Is is not true that visitors go into the display on both sides of the river? A. That is correct.

XQ. And visitors in the display on the east side of the river probably would not be able to see the nativity scene at all, is that not correct? A. That is correct.

XQ. The Hodgson Park area is recessed from the sidewalk, is it not? A. Correct.

XQ. So that one driving by on Roosevelt Avenue at least because the area is recessed probably could not see the nativity scene at all, isn't that correct? A. This could very well be, I'm not exactly sure, I've never really driven by in a car and looked but it is recessed down in, you probably would be able to see the top of the, I know you can see the reindeer very clearly which is about 15 feet high but the actual nativity scene, the highest point in that scene is only [123] five feet.

XQ. If the nativity scene were not in this display would the costs relating to the watchmen and the general lighting in the area except for the two spotlights, would that cost change in any way?

MR. DeLUCA: Objection.

THE COURT: Overruled.

A. No, it would be the same.

MR. McMAHON: No further questions, Your Honor.

THE COURT: Anything further?

MISS BLANDING: No, Your Honor.

(Witness excused.)

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[1] THURSDAY, FEBRUARY 5, 1981

(Court convened.)

MISS BLANDING: Your Honor, for out first witness we would call Richard Mumford.

THE COURT: Didn't counsel advise the Court that they wanted to have the Mayor testify so that he could be free today.

MR. McMAHON: Yes, Your Honor, but I think the witness will be brief.

THE COURT: Okay, I just say it, bring it to mind that if you wanted to call him out of time I don't think anyone would object and I certainly wouldn't.

RICHARD MUMFORD,

having been first duly sworn, testified as follows:

Direct Examination by Miss Blanding

Q. (By Miss Blanding) Mr. Mumford, are you employed by the City of Pawtucket? A. Yes, I am.

Q. And in what capacity are you employed? A. I'm Director of Finance.

Q. How long have you been the Director of Finance? A. Since March of 1977.

Q. As the Director of Finance what are your duties? A. As Director of Finance I'm the chief fiscal officer for [2] the city in charge with the preparation of the budgets and the planning and execution of the long range financial goals of the city.

Q. Are you familiar and have access to the accounts of the city, in other words when the city has to pay bills, keeps receipts of those and also budgets? A. Yes, I am.

Q. Now, Mr. Mumford, in the subpoena you were served to appear today you were requested to bring certain documents with you relating to budgetary expenditures, did you bring those with you? A. Yes, I did.

MISS BLANDING: If I may have a minute, Your Honor.

(Pause)

Q. I'd like to show you these and ask you if you can recognize them? A. Yes, I do.

Q. These are copies, did you have these prepared? A. Yes, I did.

Q. And what were they prepared from? A. They were prepared from the original documents which you have also.

Q. What was the original document? A. Annual operating budget of the City of Pawtucket for the [3] fiscal year ending June 30, 1981.

Q. And the other ones are for different years? A. Yes, they are.

Q. The same things? A. Yes.

Q. These are accurate copies of the originals? A. Yes, they are.

MISS BLANDING: May I have these marked as Plaintiff's Exhibit 8.

MR. McMAHON: No objection.

(Plaintiff's Exhibit 8 marked.)

Q. Mr. Mumford, this is the budget appropriations for the year 1980-81? A. Yes.

Q. And there is a line on here for Christmas decorations on the second page stating that the appropriation was, excuse me, the request was for $4,000, the final appropriation was $3,500, is that correct? A. Yes, that's correct.

Q. Now is that the amount that was spent on Christmas decorations? A. For the year ending June 30, 1981 which hasn't occurred yet, the end of that year. I don't believe we expended actually the full amount of the 3,500.

THE COURT: I'm sorry, I'm not following you. [4] What is the question, for the year ending what, please?

THE WITNESS: For year ending June 30, 1981.

THE COURT: Yes, how much was spent, please?

THE WITNESS: We appropriated $3,500 but to date I doubt if we have spent the full amount for that line item.

Q. Now what exactly does that line item include? A. That line item includes those expenditures which have been appropriated for the celebration of the public holiday, its Christmas.

Q. Would that include the labor that was paid for in terms of municipal employees? A. No.

Q. That would come under a different line item? A. Yes, it would.

Q. And would that include payment for the electricity for the displays or would that come under the light and power line item? A. I believe the electricity would probably be charged into that line item as a Christmas expense.

Q. So the Christmas decoration line item would include whatever was purchased for the display plus the electricity that was used? A. I believe so, yes.

Q. And the labor would come under a different line item? [5] A. Yes, it would.

THE COURT: Now Mr. Mumford, that's for the entire display, is that correct?

THE WITNESS: Yes, that's correct.

Q. Is there any further breakdown than this of how much the city spends for the Christmas display? A. The most, let's see, detailed will be found in the documents which I provided under the subpoena.

Q. The invoices? A. Yes.

Q. Is that what you mean? A. Hm, mm.

Q. Is there any document which combines the amount of time the city workers spent on this in terms of city expenditures in paying them plus the amount that was spent in purchasing and in lighting equipment? A. No, there is no combined document.

Q. Now I would show you this document which says "Budget Request 79-80 Final Appropriation," this was for last year? A. Yes.

Q. And for Christmas decorations on this appropriation what was the final appropriation for 1979-1980? A. It's $4,000.

Q. And do you know if that entire amount was spent? [6] A. I don't know if the entire amount was spent, I doubt it, I don't think it was.

Q. But the amount expended could go up to $4,000, the final appropriation, is that right? A. Yes, that's correct.

Q. And this is the same document regarding final appropriations for the year '78-'79? A. Yes, it is.

Q. And for Christmas decorations during that year the final appropriation was also $4,000? A. Yes, that's correct.

Q. And for the year ending '77-'78 the line item for Christmas supplies final appropriation was $2,500? A. Yes, that's correct.

Q. Now I would assume if in 1977 and 1978 the final appropriation was $2,500 and the next year it went up to $4,000 that the reason for that would be the $2,500 wasn't enough, would that be a reasonable assumption? A. Yes, it is.

Q. And for 1976-77 the final appropriation for Christmas decorations was $3,000? A. Yes, that's correct. I'm sorry, it was $4,000.

Q. This I believe would be the final appropriation for '75-'76, is that right? A. Yes, that's correct, and the line item is $4,000.

[7] Q. So except for that one year it has been pretty consistently $4,000? A. Yes, that's correct.

Q. So I would assume that if over a period of five or six years each year at $4,000 was requested and appropriated that that would be based on the reasonable expectation of what would be needed? A. Yes, that's correct.

Q. And in none of these cases the cost of labor is included in that line item, is that right? A. No, it's not.

Q. What is this? A. This is a picture of a trial balance report which is a, it's a monthly document prepared by the city which is a recap there for balancing purposes of the expenditures related to the recreation department of the city. It's a line item accounting.

Q. All right, would that be for an entire year or for the month? A. 6/30/1978, this would be for the entire year.

Q. For the entire year? A. Yes.

Q. And this indicates for the '77-'78 year $2,431.18? A. No.

Q. I'm sorry, $1,568.82? [8] A. Yes.

Q. Was spent, was expended from the $4,000 amount?

THE COURT: Tell me, Counsellor, I feel constrained to ask you, how does this help me? This is for an entire display that covered not only that portion of the scene we visited but as well as other places.

MISS BLANDING: Well, Your Honor, Mr. Dufault testified as to the percentage that he felt was expended upon the nativity scene and upon the Hodgson Park area.

THE COURT: All right.

Q. Mr. Mumford, this has already been introduced as Plaintiff's Exhibit 7, or part of Plaintiff's Exhibit 7, and purports to be an invoice from C & K Electric Company, Inc., for the year 1979 regarding labor and materials to connect Christmas lighting as directed in Slater Mill park and the total amount indicated on the invoice is $2,946.25. Do you know what that would be for exactly? A. I believe it's for the wiring, let's see, and the materials for the wiring at the Christmas display.

Q. This would be the Hodgson Park area? A. Yes, according to the invoice, yes.

Q. Just for that area? A. Well, according to the invoice, yes.

[9] Q. And that would be, it also says "labor" here. Now Mr. Dufault testified that this year city employees performed that function. Do you know if the city employed people from C & K Electric Company in 1979 to set up wiring? A. Yes, I believe so. Let's see, the function was subcontracted out.

Q. And this would be the area that the nativity scene is located in, is that right? A. The entire area.

Q. Right, but the nativity scene is located in the area that this lighting refers to? A. This is located within the park, yes.

Q. I'm going to show you this document and ask if you can identify it? A. This document appears to be a check of the City of Pawtucket, it's a processed check for a payment to the Imperial Electric Company, Inc., for $1,223.62.

Q. And that's dated January 11th of this year? A. No, it's of last year.

Q. Last year? A. January 11, 1980.

MISS BLANDING: I offer this as plaintiff's next exhibit.

(Check dated January 11, 1980, marked [10] Plaintiff's Exhibit No. 9.)

Q. Mr. Mumford, in the documents that you produced I didn't see an invoice that went with this. Do you know what that expenditure is for? A. Not off the top of my head, no, I don't.

Q. Were all the expenditures that you put, that you brought in related to the Christmas display? A. Related to the 355 line item, yes, it was within the budget.

Q. So this would have gone for the Christmas display? A. I believe so but I don't know. I don't know exactly.

MISS BLANDING: I have no further questions, Your Honor.

THE COURT: Do you have any questions of this witness, Mr. McMahon?

MR. McMAHON: Yes, Your Honor.

Cross Examination by Mr. McMahon

XQ. (By Mr. McMahon) Mr. Mumford, referring to Plaintiff's Exhibit 8 about which Miss Blanding questioned you, all these documents indicate is an overall expenditure for the entire Christmas display of the City, is that correct?

A. Yes, that's correct.

XQ. These documents and all the documents you have been relating to the budget item do not break down different elements [11] of the Christmas display as to cost, is that correct? A. Yes, that's correct, they do not.

XQ. Before this suit arose, Mr. Mumford, had you ever had occasion in any of your budgetary preparations to break down separate elements of the Christmas display? A. No, I did not.

XQ. You have always treated it as an overall city expenditure, is that correct? A. Yes, that's correct.

* * *

[19] MICHAEL WERLE,
having been first duly sworn, testified as follows:

Direct Examination by Miss Blanding

Q. (By Miss Blanding) Dr. Werle, what is your profession? A. I'm a clinical psychologist.

Q. And are you licensed to practice clinical psychology in the State of Rhode Island? [20] A. Yes, I am.

Q. How long have you been so licensed? A. Since 1970.

Q. And what exactly is your license in the state? A. I'm not sure I understand the question.

Q. Is your license called Clinical Psychologist? A. The license I believe is just psychologist.

Q. That allows you to enter into private practice, counselling? A. Yes, it's required in order to be in private practice.

Q. And do you have any other licenses? A. No.

Q. Or are you registered on any other list, qualification list? A. Yes, I'm sorry, I'm a registered person in the National Register of Health Service Providers in Psychology which is a national register of psychologists.

Q. And what is the purpose of that registration? A. Essentially they're, to standardize the base line requirements for private practice for third party payers, insurance companies, Blue Cross.

Q. Those are national standards? A. Those are national standards.

Q. How long have you been registered with them? A. Since its inception in 1975.

[21] Q. Where did you receive your professional training in psychology? A. Boston University.

Q. And what degree did you receive from Boston University? A. E.D.D., a doctor in education.

Q. And was that in any particular specialty? A. Yes, it was in college counselling. It was preparation for work in college counselling centers as a psychologist.

Q. And when did you receive that degree? A. 1969.

Q. Now as part of that degree program did you participate in any clinical program or training programs? A. Yes.

MR. McMAHON: Objection, Your Honor, perhaps I didn't hear the question.

THE COURT: She wants to know if he participated in any training programs.

MR. McMAHON: I thought I heard the word "political," I'm sorry.

MISS BLANDING: No, clinical.

MR. McMAHON: I'm sorry, Your Honor.

THE COURT: All right.

THE WITNESS: Well, it was a doctoral program, had extensive practical work during which time I worked [22] in a variety of clinical settings, one year in the Institute for Mental Health, one year at Shirley Industrial School in Massachusetts and one year in a private school.

Q. And what other academic training or degrees do you hold? A. I hold a Master's in education from Northeastern University in reading and a Bachelor's from Balhigh in History. I'm also certified as an effectiveness training instructor through effectiveness training. This involves parent effectiveness training which I've been extensively involved in in Rhode Island for the past five years.

Q. What are the requirements for that certification? A. Training that's developed by effectiveness training in California.

Q. What is your present occupation? A. I'm in private practice now consulting in clinical psychology, I have been for three years.

Q. And where is your office located? A. 849 Post Road in Warwick.

Q. As a clinical psychologist with a private practice, what exactly do you do? A. I have a general practice, I work with adults, families, marriage counselling and children in about equal parts. I also consult to two programs in the state, CODAC in [23] Cranston and the ROAD program in Woonsocket.

Q. And what do those two programs, what are they involved with? A. Those are involved in substance abuse treatment, alcohol and drug abuse treatment.

Q. Prior to entering private practice in 1978 were you employed in any other professional psychology positions? A. Yes, I was clinical director of CODAC for six years and before then I was associate professor of psychology at Salve Regina College from 1969 to 1974. I was chairman of the department of psychology as well as director of the counselling center at the college for two different years. Before then I was an assistant professor of education, Northeastern University, from 1965 to 1969. Before that I was an elementary reading teacher.

Q. Do you belong to any professional associations? A. I'm a member of the Psychological Association, the Rhode Island Psychological Association and the American Association of the University of Professors.

THE COURT: Doctor, I think for the record the acronym CODAC might not mean very much.

THE WITNESS: I'm sorry, it's Community Organization for Drug Abuse Control.

Q. Now Doctor, in your present practice, would you describe [24] what percent of your patients are children and what percent are adults? A. I'd say it's about 40 percent children and 60 percent adults.

Q. And where do you get referrals from for your clients? A. A large percentage of my referrals for children are from school systems. My adults tend to be referrals from physicians, lawyers, really a fairly broad range of referral sources.

Q. Dr. Werle, have you seen the nativity scene which is the subject of this suit? A. I'e seen photographs of the nativity scene. I did see the display from the street, I was in Pawtucket on another venture and saw the display from the street, the lighted trees.

Q. Okay, and when did you see that? A. I saw that shortly before Christmas, I was in fact lecturing to a group of Pawtucket city employees on the dangers of smoking and on my way to the City Hall noticed the lights, was very attracted by the lights and had planned to go in to see the rest of the display, did not because I didn't have enough time to do that and meet my obligation.

Q. Now as part of your clinical work with your patients have you done any work relating to symbols and how [25] people identify with symbols? A. I've done a lot of work with children particularly in the second and third grade which is a period where a lot of identification is going on, that is, children are beginning to really take on a self concept and symbols play a very important part of that process and children, if their father is in the military for instance will take on the symbols of that in terms of dress in terms of medal or hat. Symbols take on a great deal of meaning for children in the process of identification as they do for adults but it's more visible and obvious with children.

Q. Now, on Tuesday there was, you were not here Tuesday, were you? A. That's correct, I was not.

Q. There was testimony by Daniel Donnelly and Steven Brown that the nativity display in Hodgson Park represented to them a religious symbol and indicated support from the city for that symbol. Steven Brown also testified as to his sense impressions from callers who had telephoned in to him regarding the scene. Mr. Brown also testified as to his sense impressions from callers who in his impression from many of those calls were that the people who called perceived the nativity scene in Hodgson Park as a religious symbol and as being [26] supported by the city. Now, do you have an opinion as to what psychological effects there would be on an individual who felt the way these people described this feeling and who did not believe in that particular religious symbol or religion it signified?

MR. McMAHON: Objection, Your Honor.

THE COURT: What grounds?

MR. McMAHON: First of all it's leading and secondly, it's based on a characterization of testimony that's in the record that this witness did not hear and thirdly as a hypothetical question it is grossly incomplete.

THE COURT: Counsellor, with all due respect for all grounds, none of which have merit. Number one, a hypothetical can be based on evidence which is not even admissible. Two, a hypothetical does not have to include all the facts and number three, the very purpose of the opinion is to tell us what these sense impressions were and it lies within the discretion of the Court and the Court can permit leading questions to "develop the case." So the objection is overruled and you may proceed.

A. I think that the nativity scene is a very powerful religious symbol because it is a symbol of worship. Unlike the secularized dimensions of the Christmas [27] celebration the trees, Christmas trees, lights, reindeer, Santa Claus, the nativity scene is clearly a symbol of the worship of Jesus. My concern is that when young children who would be very attracted by the

display, $1,500 worth of candy and everything else, that's the intent of it, when they go in to such an environment they are totally open to that environment, it's magical to them. They don't think about it, they simply experience it so that the impressions that are made on the child and under those circumstances are very, very vivid. That's what makes it fun and that's why parents like to do it. The problem with such a symbol as the nativity scene for someone who is not Christian, either is a non-believer or is of another faith, is that in seeing that it raises profound questions for that child insofar as whether or not he is okay or more importantly and as part of that whether his parents are okay because unlike a nativity scene in a churchyard where a child might ask what that is and the parents can say that's the symbol of the worship of Jesus which is a part of this Christmas celebration, that's what it's celebrating in part, in a public setting the question has to be raised for the child as to whether they are in fact part of the culture represented. I think the response to this suit in the [28] paper which I've been reading and the letters to the editor visibly illustrate just how important, how symbolically important the nativity scene is to folks, how dearly they hold it. Santa Claus, Christmas trees, even gift giving, are done in non-Christian families, in non-believing families all over the country, everybody has a Christmas vacation but the nativity scene has a different aspect and different dimension.

Q. Are you testifying that the nativity scene seen, if publicly supported, by a child who did not come from a Christian family is going to evoke a conflict of some type in that child? A. Yes, it evokes a sense of identification problem. Who am I, you know, what do I belong to, am I part of this country or am I part of my family and is that in conflict.

Q. How about adults, do you have an opinion as to what effect such a symbol might have on an adult who did not believe in the Christian religion? A. Yes, I believe it encourages a religious chauvinism. For an adult to see such a symbol reinforces an already prevalent attitude in our country that we are

a Christian country. We recently heard that on the radio that we are a Christian country and it's only a step from there to believing that therefore other religions [29] and people who are of other persuasions are somewhat less important and have less merit so it encourages people who already confuse being American with being Christian. It makes that confusion more difficult for them to see.

Q. Is that elated to identification also? A. Yes, in the other way, in a positive way, that is, they identify themselves as Christians.

Q. Okay, so you're testifying as to a person who does believe in that symbol? A. Yes, I think that's where the problem would be more with adults I think. Adult non-believers are perhaps insulted by it but I don't think they're profoundly affected by it.

MISS BLANDING: I have no further questions, Your Honor.

(Recess taken—court reconvened.)

Cross Examination by Mr. McMahon

XQ. (By Mr. McMahon) Dr. Werle, I believe you testified you were a clinical psychologist, is that correct? A. That's correct.

XQ. Have you in your practice treated any child who has seen the nativity display at Hodgson Park in Pawtucket? A. I don't know.

XQ. Has the nativity scene at Hodgson Park in Pawtucket [30] been the subject of any of your clinical experience? A. No.

XQ. Then your testimony with respect to the symbolism is not based on your clinical experience, is that correct? A. No, that's not correct. The nativity scene is a symbol regardless of what shape or form it takes.

XQ. But this is a theoretical conclusion, is it not, and not one based on your treatment of individuals who have seen this

particular display, isn't that true? A. No, I've had much experience treating people who have religious confusions and identification problems related to it.

XQ. Well, let me get it clear. Have you treated any patient who has expressed to you in any way experience with the nativity scene at Hodgson Park in Pawtucket? A. Not at Hodgson Park in Pawtucket.

XQ. So that as far as the Pawtucket city display is concerned you have no direct clinical experience, is that correct? A. That's correct.

XQ. So that your testimony concerns the effect of symbolism in general and in locations other than Hodgson Park upon individuals who have not been exposed to the display that's the subject of this case, is that correct? [31] A. That is not correct. My testimony relates to the effect of the creche, the nativity scene, and the potential psychological consequences of that scene in a public area, that's what my testimony is about as I understand.

XQ. Well, that would apply to a department store, wouldn't it? A. No, because a department store is a private setting.

XQ. And a seven year old child would know that? A. His parents would and he would ask.

XQ. Well, his parents would have to tell him that, would they not? A. I'm sorry, I don't—

XQ. The parents would have to explain to the child the differences between a public setting and a private setting, isn't that so? A. Sure.

XQ. The child seeing a nativity scene in a department store or in a church yard or in a city hall area would not know the difference? A. But would ask.

XQ. Oh. A. He would be taught.

XQ. A child who had not been exposed to the New Testament, who knew nothing about the story of the birth of Christ [32] and who observed a baby in a crib, some in-

dividuals bending over the baby and some animals would ask the parents as to what the significance of that was, is this your testimony? A. Yes, I don't think it's possible to be a child in the United States and not ask questions about the Christian religion and its symbols. As soon as the child goes to school the child is exposed to, if we we're talking about a non-Christian child, he's exposed to children that in all likelihood are Christian and this raises questions in his mind as to what this is all about.

XQ. Well, what about the Christmas stamp that has the Madonna and child on it that the postal department puts out, the child would see that, is that a religious symbol? A. It is a religious symbol, I think it's unlikely that a child would be captured by it though, it's not designed to catch his attention.

XQ. What's the difference between the Madonna and child on the postage stamp attracting a child's attention and a display of a baby in a bed, some people around it with some animals, what is the distinction between those two symbols as far as inviting the attention of a child is concerned? A. The difference is that when you accompany the nativity [33] scene with $1,500 worth of candy and an enormous like display as well as a Walt Disney character or characters, etc., etc., that the child's going to pay attention to that whereas a postage stamp will only remotely interest him if he collects stamps.

XQ. Dr. Werle, isn't it a fact that if Santa Claus is giving out candy and there are Disney characters and a lot of lights a seven year old child is unlikely to even notice the nativity scene, isn't that a fact? A. I think not, I think he'll notice every detail there.

XQ. If Santa Claus is standing 50 feet— A. (Continued) I'd like to add, may I add to my answer. It has to do with perception and how perception works. When our attention is aroused our perception becomes much sharper. This is true of all of us, that if our attention is aroused we notice things in

much greater detail. For a child to be involved with the Pawtucket display, the lights, Santa, everything that is just absolutely seductive to the interests of a child the child will notice every part of it and will remember it for a long time, particularly if that child is three, four or five years of age. It will make indelible impressions, there's no question about that.

XQ. But if Santa Claus is standing a hundred feet away from where the nativity scene is passing out candy, the [34] child is likely to go over to Santa Claus and not even be in the immediate vicinity of the nativity scene, isn't that a fact? A. It seems to me the child would be involved wherever his parents go with him in the park.

XQ. And the child would get no effect whatever from the symbol unless he or she asked a parent, is that your testimony? A. No, that isn't my testimony. I think the child will remember what the display is, what the scene is, will see it as a confusing scene until it's explained to be a scene of worship, then he'll understand, that will make an impression.

XQ. Why would a baby in a bed with some people bending over and some animals be confusing to a child? A. It's very confusing if you don't understand the worship dimension of it. Why are these people doing this?

XQ. Well, it becomes confusing only if you know there's a worship dimension to it, isn't that a fact? A. Yes, and I think the display itself connotes that.

XQ. It doesn't connote it to someone who doesn't know there's a worship dimension to it, Dr. Werle, isn't that it? A. My opinion is that it would either do that or would cause one to question, to find out. None of us like ambiguity, children included, and they will find out what is it, what it's about.

XQ. But it becomes ambiguous only because of the worship dimension, correct? A. Yes, that's what makes it ambiguous if you don't know, if you don't understand what it is.

XQ. But if you don't understand there's a worship dimension to it then it's not ambiguous? A. No, it is because it doesn't make sense in any other dimension. Why would you have these, why would you have such a scene? Most children understand babies being looked at through glass, you know, glass partitions in hospitals, not in mangers with people kneeling before it and in obviously some sort of super important way.

XQ. Aren't children accustomed to seeing pictures of babies and cows and sheeps and adults? A. Children are accustomed to seeing babies with cows and sheeps and adults.

XQ. I said aren't children accustomed to seeing pictures and figures of cows and sheeps and babies? A. All together you mean? Because that's what we're talking about, the scene is all together. That's what makes it ambiguous.

[36] XQ. Well, a sheep is not a symbol of worship, is it? A. No, it's not as far as I know.

XQ. A cow isn't a symbol of worship? A. In some cultures it is.

XQ. Is it a symbol of worship in this culture? A. No, it's not.

XQ. Is a king a symbol of worship? A. Is a king a symbol of worship?

XQ. Yes. A. Hopefully not. Sometimes they become the object of worship which is something we're trying to get away from.

XQ. Is a make-shift stable representation held up by hockey sticks a symbol of worship? A. Not in and of itself.

XQ. Is a baby in a bed a symbol of worship? A. Only to his parents.

XQ. Is an adult kneeling, bending over a baby either kneeling or otherwise toward the baby a symbol of worship? A. Not if he's changing his diapers.

XQ. So that your testimony is that the symbolism arises only from the collective impression, is that correct? A. Yes, I believe that entirely to be true.

XQ. The only way the symbolism has meaning is in a total context, is that what you're saying? [37] A. Yes, that's what's called a creche. It's called one thing.

XQ. So that for purposes of symbolism it's inappropriate to separate one element in a total representation from another element, is that your testimony? A. I'm not sure I understand that question.

XQ. Well, you're saying, are you not, that the sheep becomes a religious symbol only by putting it in context with all of the other figures and by giving to it the worship dimension of the New Testament story, is that correct? A. I'm saying that the creche, the nativity scene which has a number of parts to it is the symbol, is a religious spiritual symbol of worship.

XQ. And it becomes a symbol only as a total integrated display, correct? A. It is a symbol, it is a symbol as a display, that's correct.

XQ. But no single piece of it is a religious symbol? A. Not separate from the others. If you had a sheep sitting there I dont't think that would cause anybody any confusion, no.

XQ. So where we have a display the symbolism derives from the total impact of the display, right? A. And how they're related to each other, that's important [38] too. That is, you know the creche is related in a very clear way of humans worshipping a baby.

XQ. And Santa Claus would be related to a wishing well, correct? A. Santa Claus is related to gift giving.

XQ. The kings in the nativity scene are related to gift giving too, aren't they? A. Yes, in the New Testament.

XQ. As a matter of fact, as far as worship elements are concerned the kings are a symbol of giving gifts to the child, correct? A. Yes.

XQ. And the whole practice of gift giving at Christmas derives from the kings in the nativity scene, correct? A. Well, I'm not sure that that is true. I think Christmas is a combination of historical events that were brought together, pagan rituals and so forth.

XQ. Well, didn't the gift giving practice at Christmas derive from the symbolism of the kings giving gifts to the child, isn't that the heritage? A. I don't know. I don't know if that's the only explanation for that.

XQ. You don't know where the gift giving practice at Christmas derived from, is that your testimony? A. Yes, that's my testimony.

[39] XQ. Now children are exposed to religious Christmas displays constantly in their normal daily life on the way to and from school and at play, religious symbols on private residences and church and private buildings, isn't this true? A. Yes.

XQ. And a child who happened to pass six church properties on the way to school would be exposed to a variety of religious symbols, is that not correct? A. That is correct.

XQ. Would all of those symbols have the effect that you have testified? A. They would stimulate his curiosity. The issue here is once their curiosity is stimulated what is the explanation to say to a child to explain religious symbols as they are offered by the various churches in our community is not to bring any harm to the child, that isn't confusing. The confusion is when that display and when that symbol is a public and governmentally sponsored entity, then it raises the issue are we not Americans.

XQ. But an eight year old child knows whether that manger scene is on public property or private property, is that your testimony? A. If he doesn't he'll find out.

[40] XQ. He'll find out if he asks his parents? A. Yes.

XQ. His parents would have to tell him the distinction between public and private property, would they not? A. Yes.

XQ. If the parent didn't say to the child that there was a distinction between governmentally owned property and private property the child would never know that, isn't that so? A. Well, that's probably true.

XQ. So that the distinction you are referring to between public property and private property arises only if someone explains that distinction to the child, isn't that correct? A. That's right, if the child is raised in Russia that distinction probably wouldn't be that clear.

XQ. So the assumption for your testimony is that if a child looking at the nativity scene at Hodgson Park asks his parents what it is then the parents' answer is going to include a distinction between the public sponsorship and the same scene on private property, is that the assumption in your testimony? A. If I'm a Jewish child and I'm with my parents who are also Jewish and I see and I'm at the park and we've [41] gone there because we do give gifts at Christmas and we even send holiday greeting cards to our friends and so we're going shopping because we are attracted by the lights and we thought our children would like it and if I'm that Jewish child and I see the nativity scene and I ask what it is and my parents say well, that's a Christian, that's Jesus, that's the Christian Messiah, they believe that this man was God incarnated on earth. We don't in our religion believe that. The child, yes, I think the child may well ask, "But isn't this a public park, why don't we have our symbols here when we have our religious holidays? Why is that not here?" And I think the parents would then have to say I don't know.

XQ. So the substance of your testimony is the child is going to say, "This is on public property, what's it doing here?" Is that correct? A. Yes.

XQ. So the child has to know the distinction between the religious display on private property and on public property, isn't that correct? A. I think that's very important that a child know that.

XQ. Now if that same Jewish child you referred to looked at a display that had a menora in it, that child probably would not ask the parent what it was, is that correct? [42] A. Oh, no, I think the child would still ask.

XQ. The child might know that though, isn't that correct? A. Might know what?

XQ. The significance of the menora, the Jewish child? A. Oh, all right, I thought you meant would he still ask about the creche.

THE COURT: What was that last question, please?

MR. McMAHON: I'm questioning the witness concerning—

THE COURT: Let me get it from the record.

(Previous question and answer read back.)

THE COURT: If you don't mind, would you accept the question in this form; would your opinion be any different if the menora was displayed in the same location simultaneously with the nativity scene?

THE WITNESS: No, my opinion wouldn't be any different at all. Should I answer your question, Your Honor?

THE COURT: I should ask if counsel object to the question, do you object to that question, Mr. McMahon? If so, I'll withdraw it.

MR. McMAHON: No, I don't object to that question, Your Honor, I would like to add to it but I don't object to it.

[43] THE WITNESS: No, my opinion wouldn't change at all in that regard because it would simply compound the problem, that is, it would extend now to one more religion simply because it's large and has a large number of adherents. The same basic error that the inclusion of the creche makes. It seems to me that it would just be an endless process of, and what would non-believers, where would non-believers be then? What would we have for them? I don't think that would resolve the issue at all.

XQ. But isn't it a fact, Doctor, that a symbol has only such meaning as the viewer's preconception brings to it, isn't that a fact? A. Viewer's preconception?

XQ. Yes. A. No, it has meaning, it takes on meaning at the point of contact too. If I had no preconception of the sym-

bol but the symbol is confusing to me then I have no preconceptions but yet I will walk away from it affected by it.

XQ. Your testimony is that a Madonna and child is not confusing but a nativity scene is, is that correct? A. No, I did not say that. I said that a postage stamp wasn't and a public park was.

XQ. Because it is public? [44] A. Yes.

XQ. And because the individual knows that it's public. A. Because it's public and because it's designated to attract attention.

XQ. But if the individual doesn't know that it's public then that significance does not exist, correct? A. That's correct, if the individual did not understand the distinction between public and private property and lived in a culture where that distinction wasn't made it probably wouldn't matter.

XQ. So that the key to the impact of the display in this case upon the child is the fact that it's being displayed on public property, is that your testimony? A. And by including the fact that that means that it's governmentally sponsored.

XQ. Well, suppose it were on public property and it was sponsored by a private veterans organization, would that make a difference as far as the symbolism on the child is concerned? A. I don't think so because I think that the fact that it's on public property would not really change.

XQ. As a matter of fact, if it's on public property it wouldn't occur to anybody as to who owned the display, isn't that true? A. Probably not.

[45] XQ. As a matter of fact, if you walked into a public park and you saw some figurines displayed it probably wouldn't even occur to you to ask who owned the item of personal property, isn't that true? A. Unless they offended me and I'd want to know.

XQ. You are aware, Dr. Werle, are you not, of the fact that Hodgson Park is private property? A. I was under the assumption that it was a public park.

MR. McMAHON: No further questions.

Re-Direct Examination By Miss Blanding

Q. (By Miss Blanding) Dr. Werle, on cross examination Mr. McMahon asked you if you had any direct clinical experience with this particular display. Do you have any clinical experience or research experience with religion? A. Well, it's been a great interest of mine because I feel that when I deal with people in psychotherapy on the issues of spirit and spiritual choices are very important to people and that's brought me very close I think to the close connection between religion and religious symbols, the practice of religion and personal identity.

Q. Now with regard to public support or knowledge by a child that this was a public display, are you aware that the Mayor held a press conference at Hodgson Park? [46] A. Yes.

MR. McMAHON: Objection, Your Honor.

THE COURT: No, overruled, she can ask if he's aware of it. Answer that yes or no, are you aware of it?

THE WITNESS: Yes.

Q. And are you aware that he erected a podium and had some caroling there? A. Yes.

Q. Do you have an opinion as to whether this would create an impression of public support in viewers or people who read about it or heard about it?

MR. McMAHON: Objection, Your Honor.

THE COURT: Mr. McMahon, this is opinion evidence of an expert. I think I told you it can be based on inadmissible evidence. If he says "I read a newspaper to that effect" it would be admissible as part of an opinion. Overruled.

A. Yes, it's my opinion that the Mayor's press conference was part of a process which I think I'm very alarmed with in terms of what it does to people emotionally and psychologically, that is this, by identifying, by a public figure identifying himself as a champion of the specific religion it's very divisive to the community because it brings out fears in people, real fears for [47] instance that Christmas, for instance, is becom-

ing so secularized that it's lost its spiritual meaning. That's a very heartfelt feeling that people have who are Christians and who practice that and it's very hard for them not to identify with that kind of presentation on the part of their elected officials because they feel that and it makes it hard for them to see that they live in a land in a culture that guarantees the right to the expression of freedom and protects that right by making it off limits to government and government officials and it is divisive. The letters to the editor that have come out of all of this clearly illustrate this.

Q. And if the Mayor, as a part of that press conference, invited children to join in the caroling and lead the caroling at the microphone do you have an opinion as to whether, do you have an opinion as to whether they would perceive that as public support for the nativity scene? A. Well, I think I would see it as public support for a Christian celebration.

Q. And would they have to ask someone before they would understand that? A. No, I think if they're old enough to be singing carols with the Mayor they're old enough to know, you know, [48] they understand on some level or other what they're involved in.

Q. Okay, without having to ask their parents, "Is this publicly supported?" A. I think without having to ask their parents that, yes.

Q. Now you indicated that you had seen the area in which the display was located, is that right? A. That's correct.

Q. And again with relationship to knowledge of public sponsorship, do you have an opinion as to whether perceiving the whole display area in the area that it was set up next to or down the street from the City Hall and Slater Mill, and in that park area, whether that would create a presumption of public sponsorship or not in an individual viewing it? A. I can only describe—

MR. McMAHON: Could the question be read back, Your Honor.

THE COURT: Certainly, read it back, please.

(Previous question read back.)

MISS BLANDING: An individual viewing it.

THE WITNESS: I can only, I can describe what my reaction was as I came to it. I found it, you know, very attractive and made the assumption that it was a public display both because of its proximity [49] to City Hall and becuase of its size. Private organizations just don't in my experience seldom put on that kind of a display unless it's a LaSallette Shrine or something like that so my opinion, it was clearly a public display.

Q. And do you have an opinion as to whether a child who normally frequented the area, the park area I mean, Hodgson Park, might perceive it to be a public area or a private area?

MR. McMAHON: Objection, Your Honor.

THE COURT: He may answer.

A. Parks I think are generally perceived to be public especially when they're in close proximity to public buildings and they're, you know, downtown.

MISS BLANDING: I have no further questions.

Re-Cross Examination By Mr. McMahon

XQ. (By Mr. McMahon) So that a child would perceive Hodgson Park to be a public area would be wrong, right? A. According to what you said, it was not a public area, yes.

XQ. Now you said that in answer to Miss Blanding's question that the Mayor's press conference would connote the support of Christian religion, right? A. Yes.

XQ. Are you aware that at that conference the Mayor [50] announced an intention to include a menora in next year's display? A. Yes, I am aware of that.

XQ. So that the announcement that the menora was to be included next year connotes sponsorship of a Christian religion, is that correct? A. As far as I'm concerned, yes, that is correct.

XQ. If a child perceives somebody he knows to be a public figure entering church in your view is that an unhealthy public sponsorship of religion? A. No, it is not. It demonstrates, I think, to me and I think to that child that in our country even public figures have a right to their own personal expression of their religious beliefs guaranteed.

XQ. And what age child would be likely to make this distinction? A. When would a child be mature enough to begin to make those distinctions?

XQ. Yes. A. Oh, around five.

XQ. Now I believe you said that the impression of public sponsorship in the Hodgson Park area would derive from the fact that it was in close proximity to City Hall and that it was in close proximity to Slater Mill area, is that correct, is that what you said? [51] No, I said because it was in close proximity to City Hall and because of the size of the display itself.

XQ. The size of the display—so that that impression derives from the proximity of the City Hall and the size of the display, is that correct? A. For me, yes.

XQ. So that if the Slater Mill Museum Association had sponsored this display then there would still be an impression that it was public sponsorship, is that correct?

MR. DeLUCA: I object.

THE COURT: Overruled, go ahead.

A. If it was that size I would think so, yes.

XQ. And again that impression would be incorrect if the Slater Mill Corporation had sponsored the display, right? A. Yes, and it would probably be good for them if it was so for the Slater Mill Association to make clear that it was a privately sponsored display.

XQ. Oh, a private individual has an obligation to set forth that it is not a public agent? A. No, it doesn't have that obligation at all but if he wanted, if a private individual wanted to make sure that there was no confusion about that he could do it or she could do it in that way.

[52] MR. McMAHON: No further questions, Your Honor, thank you.

MISS BLANDING: I have no further questions.

(Witness excused.)

MISS BLANDING: Your Honor, I'd like to call Mayor Lynch.

DENNIS M. LYNCH,
having been first duly sworn testified as follows:

* * *

Examination By Miss Blanding

Q. (By Miss Blanding) Mr. Mayor, you are the mayor of the City of Pawtucket, is that correct? A. Yes, I am.

Q. And how long have you been the mayor? A. Since the beginning of 1973.

Q. As mayor you generally oversee the directors of each department including the Department of Parks and Recreation, is that correct? A. Yes, I do.

Q. And your supervision includes knowledge of the city's Christmas display? A. Yes, it does.

Q. And you would ultimately be empowered as mayor of the city to alter or change an aspect of the display if you chose, would you not? A. In fact I have done that.

[53] Q. And since you have been mayor the city has each year erected as part of its Christmas display a nativity scene depicting the bliblical story of the birth of Christ? A. Long before I was mayor.

Q. And you intend to continue this practice in the future? A. I moved it from Slater Park downtown and publicly said I would continue it.

Q. And in fact have you not stated that next year you intend to have an even better looking manger scene? A. I certainly hope so.

Q. Now, even if this Court were to order the City not to erect a nativity scene in their Christmas display the City would

continue to have a Christmas display, would it not? A. First of all I hope that doesn't happen, secondly if it does I will appeal.

Q. Well, Mr. Mayor, assuming that it does happen you would still have a Christmas display in the city, would you not? A. I will still assume that we would be under appeal and that we would somehow have the right to continue what we have been doing.

Q. If at some point in the future, Mr. Mayor, you were not able to put the nativity scene up, would you still have [54] a Christmas display in the city? A. That is not a question that has ever been put to me before. That question runs to my oath of office and I'm sworn to uphold the law and whatever the law is in the final determination I will uphold the law.

Q. I don't think you're understanding my question. If there were no nativity scene that would be in the Christmas display you would still have other figures displayed such as Santa Claus and reindeer and Christmas trees and lights, all the other things, would you not? A. If there were no nativity scene? I don't understand your question. You better re-phrase it.

Q. You wouldn't eliminate the entire Christmas display if you had to eliminate the nativity scene, would you? A. Oh, I'd probably figure some other way to have a nativity scene as part of the historical tradition and part of the full Christmas display.

Q. If you had to remove the nativity scene this would upset you, would it not? A. Oh, I think it would upset most people.

Q. And you feel this way because you feel that it's central to the city's Christmas experience, haven't you stated that? A. Central for three basic reasons, cultural and tradition, [55] aesthetically and to the economic well being of the community and accessibility that relates to all three of those reasons.

Q. It is also personally central to your Christmas experience, you also stated that? A. Well, it depends now whether you're going to ask me a question objectively as Mayor and my sworn duty as Mayor or subjectively as Dennis Lynch as an individual. I suppose another person serving as Mayor subjectively might feel differently than I do.

Q. Mayor, haven't you also stated that the nativity scene is central to your personal experience of Christmas because of your mother taking you to view the nativity scene when you were a child and your own religious beliefs? A. I don't know what you're quoting from but I'm here under oath and it seems to me that in the context of your talking about that I was quoted and I did say that I thought that Easter was much more important to me personally, that if Christ hadn't risen everything would have gone for naught.

Q. After this suit was instituted, Mr. Mayor, didn't you hold a press conference at Hodgson Park? A. Positively.

Q. And you had a podium erected in the park? [56] A. Yes, one of those small things that can be moved from place to place quite easily.

Q. And that podium was erected in front of the nativity scene, was it not? A. As I remember either right in front or aside of.

Q. And as part of that press conference did you not lead the viewers caroling? A. Not very well but I did.

Q. And did you not also invite school children who were present to lead the viewers in caroling? A. No, I didn't and I think you're under the wrong impression. Those children that were there happened to be in the downtown area, as a matter of fact they were in the lobby of City Hall where they come every year. They are slow children in our school system who come down and receive some candy from Santa Claus in City Hall. They were on their way to get some ice cream and went by that public conference and stopped.

Q. Did they not also participate in the caroling? A. I think so, I think everybody did. It was a happy time.

Q. But you invited them up to the podium to lead in the caroling, did you not? A. No, I didn't.

MISS BLANDING: If I may have a moment.

(Pause)

[57] Q. Mayor Lynch, I would ask you if this is not correct: "Stepping aside from a small wooden podium Lynch began holding the mike in front of the faces of several school children who began to lead in the caroling." Is that correct? A. I stepped into the crowd so that everybody could be heard over the hand mike that I had, everybody wanted, you know, to sing and I stepped through the crowd. I asked nobody to come up to the podium and join me outside of Santa Claus, he joined me.

Q. Now Mayor Lynch, I believe that you've indicated that you've received numerous phone calls and communications regarding people's feelings about the nativity scene and about this court suit, have you not? A. Never received one until I was sued and I have received numerous since.

Q. How many phone calls would you say you have received? A. I would estimate of those that we kept a record on probably 75 to 100 in the office, I don't know how many at home, a number at home. My home phone number is also listed and also a great many of written communications from a wide area, beyond Rhode Island.

Q. Did you bring those written communications with you today, Mr. Mayor? A. We have them, the attorney has them.

[58] (Documents handed to Miss Blanding.)

MISS BLANDING: Your Honor, if I may have a moment to look at these.

THE COURT: Certainly.

(Pause)

Q. Wouldn't you say that your impression of some of these letters and telephone calls were that they expressed the individual writer's or caller's religious views? A. I think what the communications represent that I received verbally, whether it be by telephone call or by any of those letters that you're looking at was an outrage over the suit that was brought against us.

Q. But wouldn't you also say that some of them expressed the view that the nativity scene was a religious symbol which you were supporting? A. I think that part of the shock and the outrage over the suit brought people to express their views and somewhat varied as to why that tradition should continue.

Q. Wouldn't you say, Mr. Mayor, that for instance this card, "Dear Mayor Lynch, God bless you, I admire your stand on the nativity display. I thank God for men like you," and then a quote from Isaiah, "No weapons formed against me shall prosper," expressed the person, expressed the fact that the person feels that this is [59] a religious issue? A. I think it was very nice of the person to send me that card.

Q. Or that a card which says, "Thank God for a good Catholic mayor like you. Bless you and yours," would express the fact that this person is viewing this as a religious issue? A. I put that in the same category as the Jewish community supporting me in Pawtucket.

Q. Would you agree that some of these responses express the view that this was a majority point of view and therefore should remain as opposed to a minority point of view? A. Not as opposed to minority, I don't think you'll find anything in there, and none to my recollection certainly that anybody considers that as doing anything adversely to any minority. Every expression that I have received had been a positive one and a questioning why anybody would enter into a challenging of what has been a very joyous occasion for all people.

Q. How about a letter that says, "I applaud you, it's time that someone with courage stood up to the few who want to dictate to the majority as to what they cannot celebrate and revere in the way that they wish to." Wouldn't that indicate to you that that person felt [60] this was a majority position and therefore should be maintained? A. I think that's indicative of people who express their view to me that they had made the simple assumption that this would always be there because it was a good thing and they're outraged again over the questioning of what is good for all.

Q. Did you receive as one of the communications a letter from the Knights of Columbus, Pope John 23rd Council 5498? A. Where are they located?

Q. Midland Park, New Jersey. A. If it's part of our communications I certainly received it.

Q. And do you recall the expression in that letter indicating that this is a religious issue? A. I don't recall, my recollection of that letter was that it was quite a lengthy one. I think you have to keep in mind that I did not solicit any of these letters and the record shows that you have no letters before the institution of the suit.

Q. Mr. Mayor, what I'm asking you about is not whether you solicited the letters or when they were sent to you but rather what people perceived the nativity scene as? A. I know, I just thought I'd make that clear.

[61] MISS BLANDING: Can we go back to my question, the last question before.

THE COURT: Read the quetion again, Mr. Spertini.

(Previous two questions read back.)

A. No, I don't. My only recollection, as I stated to you, is that that particular letter was rather a lengthy one. I cannot possibly remember with all the communications what one, that's possibly only a part of a sentence too, you know, is in a particular letter.

Q. Mr. Mayor, from the first paragraph of that letter, "that during this most holy Christmas season the atheists and American Civil Liberties Union are most active in their endeavors to destroy all those things that we as Christians hold closest to our heart and souls, our beliefs in the birth of our Lord and saviour Jesus Christ," wouldn't you say that that expresses a perception that the nativity scene is a religious symbol? A. No, maybe to that particular person but my goodness, people are entitled to their views as I'm entitled to mine and there was a wide and varied expression of opinion in all communications and I stated that previously to your question.

Q. But you would agree that many people view the nativity [62] scene as a religious symbol? A. Are we talking about our Christmas display?

Q. No, Mr. Mayor, I'm talking atout the nativity scene. A. Well, how in the world would I know how, you know, everybody feels. All I know is that for the forty years that I can testify to it has been a joyous occasion for all people in the community to participate in. Now I assume that's many people. I assume that that's the majority of people that have been happy and I do that based upon some reliance upon the fact that nobody has quetioned it until this time.

Q. I'm not asking you with regard to whether it makes people happy, Mr. Mayor, I would say wouldn't you say it would be reasonable to assume that many people view the nativity scene as a religious symbol? A. Well, I mean, I'm well aware of people including a Jewish friend of mine who took his three youngsters down to see the display so how would I know what people, you know, what their particular or individual reasons are for enjoying the display.

Q. Do you have an opinion as to whether many people or some people would view it as a religious symbol? A. I don't think they'd look at our Christmas display as a religious symbol.

Q. I'm asking you about the nativity scene, Mr. Mayor. [63] A. And I put up a Christmas display not just a nativity scene.

Q. Mr. Mayor—

THE COURT: I don't like to interrupt but there's a little notation I made on my notes, there was a question asked which I didn't hear the answer to or wasn't answered and I'd like to put it again and this is, I'm trying to paraphrase the question asked by counsel, it's not one that stems from the Court, all I want is just the answer on the record. The essence of it was that let us assume that the Court renders an opinion which is appealed and of course if the appellate court states that the nativity scene can be shown that's the end of its but what if the appellate court ruled that the nativity scene could not be part of the entire Christmas display, the question was would you nevertheless have the Christmas display without the nativity scene, can you answer that for us, please?

THE WITNESS: Well, Your Honor, as you well know, I'm not an attorney, you'd have to tell me if I have a right of appeal from the appellate court for the answer to that question.

THE COURT: Well, let us assume that the whole gambit of appeals are exhausted.

THE WITNESS: Okay, that's what I tried to [64] answer, assuming the whole gambit of appeals is exhausted I have a sworn obligation to uphold the law, that's part of my oath of office which I say and take under God.

THE COURT: And does that mean then that you would have the Christmas display without the nativity scene?

THE WITNESS: Well, there are other alternatives, Your Honor.

THE COURT: Such as?

THE WITNESS: Such as the offer from the Slater Mill Association and other people to have the very display that's existing there in the very same spot and in other spots of my com-

munity. We would look at our alternatives as to what would be the best judgment to make for the overall best interests of the overall community.

THE COURT: In other words, as Mayor you would still press to fing some way to display the nativity scene?

THE WITNESS: No, I'm not saying that, Your Honor. What I'm saying is I have a responsibility to listen to the people, every two years they get a chance to respond to my ability to do that, this year included. I would have to review the situation given [65] those circumstances. I also said in answer to that question that I would hope the hypothetical question you just gave me never happens.

THE COURT: All right, go ahead, I won't press it, go ahead, Consellor.

Q. Mr. Mayor, I believe that you've indicated that your impression from the telephone calls and other communications that you received was that people were very angry over this issue, is that correct? A. Angry over the suit being brought.

Q. And did you—

THE WITNESS: It was a very divisive thing, if I might further explain your question. The bringing of the suit was a very divisive thing in the community and that divisiveness had never, and I am a life-long resident of the community, had never been seen in my community before.

Q. Didn't you also indicate that some people were critical of the city because they believed the city by its actions were trying to foster a religion? A. I had no complaints until the suit was brought.

Q. I'm not limiting the time span for the answer, Mr. Mayor. A. I'll answer whatever time span you, if you can, you know, help me with your question.

Q. Since the suit has been brought haven't you indicated [66] that some of the people who communicated to you were critical of the city because they believed the city by its actions were trying to foster a religion? A. No, and whenever I've

answered that question as it has been posed before it was only related to those involved in the suit and the ACLU. Those are the only complaints that we have heard.

Q. Did you have an interview with a reporter from the Good News Paper? A. Yes, I did, a 27 minute interview.

Q. Pardon? A. A 27 minute interview with a fine young man, I don't remember his name but there are many incorrect, well, uses of English I think is probably, because I think he did a fine overall job of reporting long interviews.

Q. And didn't you state in that interview that "I've never seen people as mad as they are over this issue. The people absolutely resent somebody trying to impose another kind of religion on them and that is not what the Constitution meant. Some are even critical of us of trying to foster a religion which we are not." A. Yes, that's the ACLU and this suit. That's exactly, if you want a clarification of my statement, that's exactly what I meant there and what I have said in other places and when I said about the fostering of [67] another religion I think the denigration, trying to eliminate these kinds of things is a step towards establishing another religion, non-religion that it may be.

Q. Mr. Mayor, you wouldn't say that the people who became angry over this issue viewed it as— A. As a matter of fact, I quoted Network in that same paragraph, didn't I?

Q. May I finish the question, Mr. Mayor. A. I thought you had.

Q. No, I hadn't. Wouldn't you say that the people who expressed this great anger that you perceived over this issue were not reacting as though it were trivial but were in fact acting as though it were very important to them? A. No, there are two aspects to the reaction of people to that. They thought it was frivolous and trivial upon the ACLU and those who are active in bringing the suit to do such a thing. The second aspect of that is they did not consider it trivial to be questioned on what they had accepted for so many years as a good thing.

Q. So that people who became angry over this issue did not view it as a trivial matter, is that right? A. That's not what I said. I said there were two aspects to that, they thought that it was trivial, they thought that [68] it was very small of anybody to question what had been accepted by the community.

Q. So they became angry over a trivial matter, is that what you're saying? A. No, the bringing of the suit was a trivial and small part by all of those involved in it, that was the clear impression from the people.

Q. They also were stating that it is not a trivial matter to them to be able to continue tradition? A. There are two answers to that question, two aspects to it.

Q. Wouldn't you anticipate, Mr. Mayor, that some individuals might view a scene depicting the birth of Christ as a religious scene that would express their Christian religion if they were Christians? A. Then why didn't I have a complaint in all of these years.

Q. Mr. Mayor, would you answer the question? A. No, the answer is no, I don't. I have no knowledge, if I understand your question and I'd like to have the question read back, Your Honor.

THE COURT: Certainly. Read it back, Mr. Spertini.

(Previous question read back.)

A. Well, I mean, that sounds like a couple of questions to me. If you'd like to re-phrase it I'll attempt to [69] answer it.

Q. Mr. Mayor, wouldn't you anticipate that a Christian person viewing the nativity scene might see it as an expression of the birth of Christ and as part of his or her religious experience? A. I think it's more likely if they're like me with seven youngsters kind of trying to figure out where they all are in line to collect candy from Santa Claus and I don't think the average person looks at our Christmas display as a religious experience, no.

Q. You wouldn't say that it was reasonable for a Christian who believes the biblical story of the birth of Christ to see the

nativity scene as part of his or her religious experience? A. Well, in order to answer your question I have a great deal of difficulty in separating any part of, I mean my goodness, if someone were just to look at the Disney characters they may think that I'm Walt Disney running the city of Pawtucket.

Q. Mr. Mayor, I'm not asking you about the Disney characters, I am asking you wouldn't you anticipate that a Christian person viewing a navitity scene, including your nativity scene, might view it as an expression of the birth of Christ as depicted in the bible and as part of their religion? [70] A. If that person happened to believe that way wherever they would see a nativity scene I suppose that would be true.

Q. And if that person were of the Christian faith might they not revere such a scene? A. Well, I think that ties in with your earlier question, if that's what a particular individual believes wherever they see a nativity scene I would think that they would revere it.

Q. Do you find such a response reasonable? A. For people to believe in something and revere it, yes, that's reasonable.

Q. For people who believe that the birth of Christ is part of their religion to revere a nativity scene and in particular the nativity scene in Hodgson Park? A. I haven't seen anybody holding any services or revering so I don't know what your definition of revere is.

Q. Mr. Mayor, have you responded to any of these letters? A. Not yet, I hope to respond which is the normal course of business in my office.

Q. And how do you intend to respond to them? A. Usually in particular when you're involved in issues like this because of the amount of work being the chief executive of the city it's usually a simple note [71] acknowledging the fact we have received the communication.

Q. Mr. Mayor, are these the communications which were addressed to you in your office that you brought in to court today in response to the subpoena? A. They appear to be.

Q. And are these all of the newspaper articles which you or your office found relating to this issue in the suit? A. They appear to be.

MISS BLANDING: I would like these marked as Plaintiff's Exhibits No. 11 and 12.

THE COURT: Any objection to these, Mr. McMahon?

MR. McMAHON: No, Your Honor, I didn't hear the numbers.

THE COURT: 11 and 12, no objection, they may be marked.

(Plaintiff's Exhibits 11 and 12 marked in evidence.)

Q. Mr. Mayor, is this the report of your interview from Good News Paper? A. That appears to be.

(Pause)

MISS BLANDING: Can I see 12.

THE COURT: I must say, I'm a bit confused, what are we doing, are you offering that, are you [72] objecting?

MR. McMAHON: No, the document is in there, Your Honor, it's already been introduced. We understand that it's part of the package.

THE COURT: Well, then we don't want it in twice, do we.

MISS BLANDING: No, I just wanted to make sure the article was there. I didn't see it when I looked through it before, that's all.

THE COURT: Okay.

MR. McMAHON: If it isn't it was supposed to be in there.

THE COURT: Tell me, Mr. McMahon, do you object to that newspaper?

MR. McMAHON: It's there.

THE COURT: Okay. When you did not object you were aware that it was part of the evidence?

MR. McMAHON: Yes, it's part of the file that the Mayor maintained, on that ground I have no objection.

THE COURT: Now wait a minute. If you don't object that's a piece of evidence that's in for all purposes.

MR. McMAHON: That's correct, Your Honor, I understand that.

[73] THE COURT: All right.

MISS BLANDING: Your Honor, this is a record of some telephone calls, that was part of that packet which is already introduced which I inadvertently left out.

THE COURT: All right.

Q. Now Mr. Mayor, you have also indicated that next year you intended to erect a menora in the Christmas display in honor of our Jewish brethren who supported you, is that not right? A. Well, that's not the full reason as to why I believe the quote ran, where is that quoted from?

Q. I believe from both the Pawtucket Times and the Bulletin. A. That's an incomplete reason but yes, I said that I would put up a menora.

Q. But did you say that it would be in support of— A. No, that's not a correct quote.

Q. You never said that? A. No, what I said was, as I remember it and certainly how I feel today and I will state under oath that I'm sorry I didn't think of that before, I think that that is a very important thing to have as part of, as other communities have done and that I intended to make that part of our display next year.

Q. Wouldn't you say that the menora is a symbol of [74] Judaism? A. As I understant it but it's much more than that in my opinion and that was why I said that I would put it up and I think for the very reasons that others have, that it's part of our culture, tradition and an historical fact.

MISS BLANDING: No further questions.

THE COURT: Do you want to question the Mayor now, Mr. McMahon, or do you plan to call him at some other point?

MR. McMAHON: Well, Your Honor, since he is not going to be able to be here tomorrow if it's not imposing on the Court I would—

THE COURT: I will authorize it if that's what you want.

MR. McMAHON: I would like to do it.

THE COURT: Do you want to go right on or do you want a short recess?

MR. McMAHON: Well, it may be somewhat extended so a short recess might well be in order.

THE COURT: All right, we'll take a short recess.

(Recess taken—court reconvened.)

Cross-Examination By Mr. McMahon

* * *

XQ. (By Mr. McMahon) Mr. Mayor, some of the items that you [75] have been questioned about, prior to the press conference to which you have testified has there ever been a press conference at the Hodgson Park Christmas display before? A. No, sir, there hasn't.

XQ. And I will ask you whether the subject of the press conference was the lawsuit in this case? A. Yes, it was.

XQ. I believe you testified that the city has owned the nativity, has displayed the Christmas display including the nativity scene for approximately 40 years? A. To my knowledge so I'm told that that goes back before then, but I mean I can remember it.

XQ. Prior to the institution of this lawsuit are you aware of any letter to the editor being written to any newspaper concerning a nativity scene? A. No, sir.

MR. DeLUCA: I object.

THE COURT: I'll let the answer stand.

XQ. And I believe you testified in response to questions from Miss Blanding that you had never received a call concerning the nativity scene in this display until this suit was instituted, was that your testimony? A. Yes, sir.

XQ. I believe in answer to a question of Miss Blanding's [76] you referred to some comments as being in the same category as

the support of the Jewish community, will you please explain that statement, Mayor? A. As a result of the suit being brought and communications starting to come from people who are upset over that one of the first communications was from the Jewish community in Pawtucket, in particular those connected with the new Jewish synagogue on East Avenue in Pawtucket and offering their support telling me that they considered what we had been doing for so many years to be a thing of joy and not a religious service or observance of any kind.

XQ. From your testimony, Mayor, I will ask you whether you consider that the community morale is a major factor in the sponsorship of this Christmas display? A. Yes, sir, it is.

XQ. And do you regard that as one of the principal reasons for this particular display? A. Yes, I do.

XQ. Now also clarifying questions asked by Miss Blanding and His Honor, trying to go at it from another direction, if the city lost through theft or otherwise the nativity scene and did not have the money to replace it would you nevertheless put up the city's Christmas display? [77] A. Yes, sir, I would.

THE COURT: You mean without the scene, Mr. McMahon?

MR. McMAHON: Please, Your Honor?

THE COURT: You mean without the nativity scene?

MR. McMAHON: Yes, Your Honor, I think the witness was confused concerning, relating it to the court suit. I'm just trying to approach it from another way.

THE COURT: Thank you, I appreciate the clarification.

XQ. So that, Mayor, as far as you are concerned the nativity scene is merely an element of what is, in your view, a secular Christmas celebration, is this correct? A. I consider it incidental and not the main thing of the Christmas display, not the primary reason. Therefore if what happened under your previous question were to occur, which I would of course hope that it wouldn't but if that were to occur and those were the circumstances I would go ahead with the Christmas display.

XQ. Now Mayor, in your experience both as Mayor and as a resident of the City over the years observing this Christmas display, do you know whether in your [78] experience any person

has ever visited the Christmas display for the purpose of worship? A. I'm not aware of anybody ever having done that nor any group.

XQ. Are you aware of anyone regarding the Christmas display as an object of worship? A. No, sir, I'm not.

XQ. Now in your annual arrangements for the construction of this Christmas display do you from time to time consult with groups and individuals outside of the municipal government? A. Yes, sir, I do.

XQ. And what are some of those individuals or groups? A. Starting from the time that I thought in my own mind that it would be a good idea to bring the display from Slater Park to the downtown area that consultation on a formal basis was with the Slater Mill Association and its officers and members. Since that time there's been constant communication with downtown Pawtucket merchants, Downtown Pawtucket Associates, I believe is their correct title as a group, and individuals in the area who have expressed their opinion as to what they would like to see happen with that display.

XQ. Have the downtown retail merchants expressed to you as Mayor an interest for commercial reasons in the [79] continuance of this city display?

MR. DeLUCA: I object.

THE COURT: Well, no, I'll allow it, overruled. It's based on hearsay but nevertheless I will allow it.

A. They have expressed to me directly the request for the continuation and expansion of such a display as being important to them in the downtown area.

XQ. Do you know, Mayor, who is the largest retailer in downtown Pawtucket? A. Yes, sir.

XQ. And who is that? A. That's the Apex store.

XQ. And do you know who is the second largest retailer? A. Yes, sir, that would be the Peerless store.

XQ. And where is this display situated with respect to the Peerless store and the Apex store? A. It sits between the two.

XQ. And approximately how many feet from the edge of the property line of each, from Hodgson Park to Peerless and from

Hodgson Park to Apex? A. Remembering that the Christmas display entails almost 40,000 square feet on both sides of the river and keeping in mind that Peerless is on the western side of the river, it is only across Roosevelt Avenue which [80] is an 80 foot wide street from the most westerly boundary of the Christmas display or Hodgson Rotary Park and on the other side, from the easterly, most easterly boundary of Hodgson Rotary Park to Apex is probably 100 to 160 feet, I'm not sure, but it's that close.

XQ. Now the Hodgson Park property is owned by whom?

THE COURT: May I interrupt, Mr. McMahon, while I have a thought, I wonder if counsel would be willing, not now, but at some point giving me a sketch. After the view yesterday my law clerk made up a sketch for me but we appreciate it, it's not, you know, doesn't tell us all that we want to know, but if you will all get together and give me a sketch which you could show where Apex is, the road, the land area on one side of the river, the land area on the other side of the river and this would give me a general idea of what I'm looking for.

MR. McMAHON: Your Honor, I must confess that we have a large sketch prepared by the city engineer and we left it at home. We've made arrangements to go get it.

THE COURT: Well, all right, I'd like to have it that you both agree.

MR. McMAHON: We have one that was prepared [81] by the city engineer and someone has gone to get it.

THE COURT: Something in that general idea is what I had in mind, okay.

(Document handed to Mr. McMahon.)

THE COURT: Not now, I don't mean to take time out of the hearing.

MR. McMAHON: Yes, Your Honor.

THE COURT: And it can be given at the time that you submit your post-hearing briefs and perhaps you could agree, then see whether or not you would agree that it be marked as an exhibit.

MR. McMAHON: When I get my sketch we'll confer.

THE COURT: Work it out, sure.

XQ. Now I believe you referred, Mayor, to the Slater Mill Associates, is that an exact corporate name? A. I'm not sure,

Mr. McMahon, it is Slater Mill Association, I think is probably the correct, but I don't have the real—I really don't know the correct name.

XQ. And that is what kind of a corporation, Mayor? A. That's a private non-profit organization.

XQ. And do you know what its function is? A. Yes, the primary function and reason for the institution of that was to continue the historical tradition that's so important to a blue collar, industrial city such as [82] Pawtucket. That Samuel Slater the Mill Association is named after had instituted for industrial work in Pawtucket and in fact the Slater Mill is the first cotton mill in the United States of America.

XQ. And does the city encourage and work with the Slater Mill corporation in furthering its objectives? A. Yes, sir, every year.

XQ. And does the city regard the Slater Mill complex and the operation of the Slater Mill corporation to be helpful to the general development of the downtown area of the city? A. Yes, sir, very helpful.

XQ. Now I believe in answer to a question Miss Blanding, Mayor, you said that you considered the display to, if I recall your testimony correctly, to further cultural, commercial and aesthetic purposes, was that your testimony? A. Yes, sir.

MR. DeLUCA: Objection.

THE COURT: No, overruled.

A. Yes, quite clearly, all three of those and I said that accessibility related to all three.

THE COURT: I think the three he used were cultural, traditional and economic, I'm not sure, is that correct?

[83] THE WITNESS: No, Your Honor.

THE COURT: Please repeat then.

THE WITNESS: Cultural and traditional were the first.

THE COURT: As one.

THE WITNESS: Yes, sir.

THE COURT: Okay.

THE WITNESS: Aesthetic.

THE COURT: Aesthetic and economic.

THE WITNESS: And then economic and I said accessibility related to all three.

THE COURT: Aesthetic, economic and accessibility. All right, go ahead, Mr. McMahon.

XQ. Now with respect to cultural, to a cultural and traditional objective, I will ask you what, if anything, the city does or participates in during the year in terms of cultural and traditional celebrations other than Christmas? A. Well, a great many and varied things which relate directly to a community I think that over a long period of time has done a good job in redeveloping itself and the city government has played an important role in cooperation with library, Boys Club, YMCA, a great many organizations and individuals and we join in on festive occasions, July 4th, Memorial Day, Veterans Day, and [84] other celebrations particularly in the downtown area. Until the recent completion of the mall and the opening of the free parking garage downtown those were somewhat sporadic. We had joined in in concert with the business community to plan those kinds of events that I just related on a more constant and consistent basis for the promotion of downtown Pawtucket.

XQ. For the record, Mayor, will you describe with relation to Hodgson Park where the mall to which you referred is located? A. Yes, sir, we just have completed the redoing of what is now called the auto restricted zone with the Federal Government every year, it's a new name, what we commonly know as the mall with a canopy that runs from Apex store which we have referred to earlier as being an important part of the CBD, central business district, running from there westerly up Main Street all the way up to and behind at this point the Old Colony Bank as another anchor or end at the north and westernmost part of the central business district and in those areas we have poured multimillion dollars over the last few years.

XQ. And these have been Federal and local funds? A. Federal, state and local.

XQ. Federal, state and local funds? [85] A. Yes, sir.

XQ. And when was this mall officially completed and opened? A. This past summer, I forget the exact date.

XQ. And in addition to the holiday celebrations to which you have referred have you had in the past and do you plan for the

future other seasonal activities in and around this entire mall area which you have described? A. Yes, because aesthetically it is a very pleasant place to be which was one of the aims as I stated so that we have a number of events that we will hope to hold including Hodgson Rotary Park with the continued support of the Slater Mill Association, activities on the land that we use for Christmas display.

XQ. And would you describe specifically what some of these activities are? A. Yes, we have ethnic related activities and encourage people of all ethnic backgrounds to join in with us in the celebration of their heritage in a food kind of carnival or display.

XQ. And this is an ongoing effort throughout the year? A. In conjunction with the merchants in order to continually promote the rejuvenation of the city.

XQ. And do you regard the Christmas display as simply one component in this ongoing effort with respect to the [86] downtown area? A. Clearly. That was the reason that under this administration I made the decision to move it from Slater Park to that area.

XQ. In other words, the movement of the Christmas display to the downtown area was part of the overall development of this particular area involving the expenditure of all the funds to which you've previously referred? A. Yes, sir, that was my decision and that was when it was done.

XQ. And each year when you, in scheduling the opening of this Christmas display, do you coordinate your efforts with the merchants in the downtown area? A. Yes, sir, we do, we're in constant communication with them during the year and for that particular seasonal thing we try to dovetail our activities so that it coincides with promotions that they are running on their own for the Christmas season.

XQ. And do they have Christmas decorations in their own stores which are in this immediate area? A. Yes, sir.

XQ. Mayor, to save time, I'll ask whether under your direction a sketch was prepared by the city engineer of the Hodgson Park Christmas display? [87] A. Yes, sir, it was.

XQ. And whether arrangements are now being made to bring that into court?

THE COURT: It just came.

A. Yes, sir, just, I think it just came.

(Pause)

THE COURT: Really, I don't see the need to be concerned about that at the moment. I've been there, I viewed the scene. I would suggest that some time before the briefs are submitted that you get together and give me a sketch. In other words, I would assume the discussion there is about the accuracy of the sketch, is that correct?

MR. McMAHON: No, Your Honor, it's not drawn to scale, it's just a description of everything that's there and it shows the area.

THE COURT: I see. Well, I don't know whether it has to be drawn to scale if you agree, if you put the dimensions in so that we'll know.

MR. McMAHON: The dimensions have been testified to by Mr. Dufault.

THE COURT: Well, it would help me. Let me explain to you what I have in mind. It's obvious that the opinion the Court writes will have to describe this area and for the convenience of the reader it is [88] sometimes very, very helpful to attach to the opinion a sketch of what we're trying to describe and it would be a big help to the Court if you just got together, made one in the size of the regular, not legal paper, but, you know, the size paper that I write opinions on and type them on and agree as to the areas, like so many square feet in the area, I think it's on the west side of the river, and square feet area on the other side, the Apex store, the distance as the Mayor stated.

MR. McMAHON: Your Honor, we will—

THE COURT: Eighty feet from there and the Christmas tree and the feet to the creche I think was 25 feet and all that sort of thing.

MR. McMAHON: We will arrange this to be done by the city and we will afford full opportunity for the plaintiff to view it.

THE COURT: Make it to size so that I can take it and have a photocopy made and appended to the opinion if I feel it's necessary, okay?

MR. McMAHON: Correct, Your Honor.

XQ. Just for what it's worth, Your Honor, Mayor, I'll ask you whether this, this document which I am showing you is the sketch which you have prepared? A. Yes, sir, it is.

XQ And whether that sketch shows all the elements of the [89] Hodgson Park Christmas display? A. Yes, sir, it does.

MR. McMAHON: Your Honor, I will ask that this be marked as an exhibit.

THE COURT: Any objection?

MISS BLANDING: No objection.

THE COURT: It may be marked.

THE CLERK: Defendant's Exhibit D.

(Sketch marked Defendant's Exhibit D.)

XQ. Now Mayor, there was some testimony yesterday concerning the bus stop on Roosevelt Avenue which at the moment is on one side of the Hodgson Park area, I will ask you how long that bus stop has been in that location? A. About two years.

XQ. And prior to that where was that bus stop? A. On Main Street when Main was still open, it was not an auto restricted zone.

XQ. And was Main Street in the immediate area of Hodgson Park? A. Yes.

XQ. Now who controls the location of the bus stop? A. The Rhode Island Public Transit Authority.

XQ. And the city has not control over that? A. No, as a courtesy they consult with us, inform us as to, [90] you know, what their surveys show and what they intend to do and we have some input into that but it's their decision.

XQ. And as a matter of course from time to time dealing with bus stops throughout the city do they customarily change them? A. Yes, this one we were told was done on a temporary basis until the work of the auto restricted zone was

completed, that they would review their findings at that time and make a decision, so I mean they could move that tomorrow.

XQ. Mayor, there's been some testimony with respect to the expenditures the city has made on public holidays, specifically except for the Christmas display, we've had testimony concerning the 4th of July display, do you know what other holidays the city expends money for public celebrations? A. Veterans Day, Memorial Day are the main ones.

XQ. And the activities involve what? A. The activities usually involve our support of necessary spending of money to get bands, floats and that kind of activity for parades.

MR. McMAHON: No further questions, Your Honor.

THE COURT: Any further questions, Counsellor?

[91] *Re-Cross [sic-Redirect] Examination By Miss Blanding*

Q. (By Miss Blanding) Mr. Mayor, I believe you indicated that you felt that one of the important aspects of the Christmas display was that the display promoted morale in the community? A. In my judgment, yes.

Q. Would you not also say that the Christmas display without a nativity scene would also promote morale? A. Well, I think I answered to try to clarify the earlier question that for some reason the nativity scene could not be put up by the city I would still go ahead with the Christmas display.

Q. And would you feel that it would still promote morale? A. I would assume and hope that it would and I say that because I have said as clearly as I can in answer to your questions that the nativity scene is incidental to the overall display, it's not the primary reason why the display is there.

Q. If I may go back to one of the questions relating to what the city intended to do if they could not put the nativity scene up; I believe you testified that if the nativity scene were stolen and the city didn't have money to replace it that you would still erect a Christmas display, is that right? A. Yes.

[92] Q. Now if ultimately the courts, if we go through the whole gambit of appeals, if the courts decide that the nativity scene cannot be erected will the city still erect a Christmas display? A. I think His Honor asked me that question and I'm not hedging on the answer, I have tried to point out the responsibility in elective office as the chief executive of having to look at all alternatives at that point, if that helps you, if not I'll be glad to answer another question.

Q. No, that's not what I was trying to ask you; assuming that as a result of court action you could not erect a nativity scene? A. Then I would not.

Q. But would you erect a Christmas display? A. Positively.

MISS BALNDING: Thank you.

THE COURT: Is that it?

MISS BLANDING: Yes.

THE COURT: Any further questions, Mr. McMahon?

MR. McMAHON: No, Your Honor.

THE COURT: Thank you, Mayor.

(Witness excused.)

THOMAS W. RAMSBEY,

having been first duly [93] sworn, testified as follows:

Direct Examination By Miss Blanding

Q. (By Miss Blanding) Mr. Ramsbey, what is your professional background? A. I am both an ordained United Methodist minister and I am a professor, I have a Bachelor of Sacred Theology and a Ph.D. degree from Boston University.

Q. And what is your Ph.D. degree in? A. It's in the sociology of religion and social ethics.

Q. And could you explain exactly what the sociology of religion and social ethics is? A. Well, in a way they're two different fields. Sociology of religion is a social scientific study of the nature of religion and its social functions within societies. The area of social ethics is a field dealing with ethics,

particularly Christian ethics, as they relate to society so there is both elements in a degree.

Q. And you may have said this but I think I missed it, what type of studies did you engage in in order to become an ordained minister of the church? A. To be ordained in the United Methodist Church requires a Bachelor's Degree plus three years of professional studies or graduate studies in theology.

Q. And do you hold a Bachelor's degree in theology? A. Yes, it's a Bacheor but it's only that because the [94] medieval tradition, its really on a master's level.

Q. And in addition to that you've had three years of study also in theology? A. Yes.

Q. What is your present occupation? A. I am associate professor of sociology at Rhode Island College and chair of a department.

Q. And what past positions have you held? A. Well, I've been teaching at Rhode Island College—

THE COURT: Just give us a rundown on your whole curriculum vita.

THE WITNESS: Okay, I'll try to do that. I've been teaching for the last ten years at Rhode Island College. Before that I was a graduate student at Boston University, did some teaching there and in the last three years of my graduate studies I held the position of minister of the East Braintree United Methodist Church in Braintree, Massachusetts.

THE COURT: Have you done any writing at all?

THE WITNESS: Some, yes.

THE COURT: Any publications?

THE WITNESS: No, no major publications.

Q. Has your academic training included biblical studies? A. Yes, both the theological degree include the biblical studies and the advanced degree included some biblical [95] studies. However, I am not a biblical scholar, that should be clear.

Q. Were the biblical studies related to history at all? A. Yes.

Q. Now, in terms of the sociology of religion would that include the study of symbols having to do with religion? A. Yes.

Q. Would you explain what that study would entail? A. Well, sociologists would be interested in the symbols of religion because the symbols in a very real sense represent religious groupings. Symbols only have meaning as they are associated with groups, that is, groups invest the symbols with their meaning. They do not derive the meaning out of thin air. The groups themselves give the symbols their meaning and therefore sociologists are very much interested in symbols as they represent groups.

Q. And by what method do sociologists determine whether a symbol is religious or not religious? A. Well, while there's no absolutely sharp distinction most sociologists of religion today would follow what was first initiated by Dirkheim, the French sociologist, is distinguishing between the sacred and the profane and he said that almost all of the elements in the world are divided into two camps. One is the sacred [96] and one is the profane and one can tell the difference. Everyone knows the difference between the two and can recognize the difference between the two and he said one does not move easily between the two so that there is a distinction and he said that the sacred takes on its sacredness because of its close association with a given group, that is, the group itself invests that symbol with the meaning standing for the group, that's what makes it sacred.

Q. I see, and what makes a symbol fall into the camp of profane symbols? A. Well, in the sense that it loosely belongs to everyone. It has no particular, it's no particular close tie with any given group. We would today say that it's secularized to be the equivalent of that.

Q. Now Reverend Ramsbey, have you had the opportunity to view the nativity scene that we've been discussing that's the subject of this suit? A. Yes, I have.

Q. And when did you go and see that? A. Well, I'm not positive but as I recall it was after Christmas and I believe before New Year's, I believe it was in between that time period.

Q. What was your personal reaction to that scene?

MR. McMAHON: Objection.

[97] THE COURT: Overruled.

A. I really have two reactions, first I was uncomfortable with it, it being there because I knew that it had been sponsored by the city, I was uncomfortable with that, but I think I was as much appalled by the fact that here was a very sacred religious symbol to Christianity being erected by the city in conjunction with a lot of other symbols that clearly were not specifically Christian and I felt it took away from or demeaned the Christian symbol in that setting.

Q. Now will you explain your basis for saying that you view the nativity scene as clearly a religious symbol? A. Well, I think first of all a nativity scene is derived from the biblical accounts in Matthew and Luke and doesn't appear in the other two gospels and we're not quite sure why. It is clearly a Christian symbolism because it relates only to the birth of Christ. Moreover, the symbols that go with it, the figures are kneeling in worshipful attitude, even the animals are standing in a worshipful pose. There are angels according to the testimony yesterday and I only saw the one angel at the top of the scene but angels are not in any sense of the word secular symbols and cannot be equated. Angels are messengers from heaven, they deliver good news, sometimes bad news but mostly good [98] news to people and therefore the whole setting of the creche is a statement about the divinity if you will or the extraordinariness of the birth of this baby Jesus. It is no ordinary baby and that's very clear from the symbols that are there.

Q. Do you have an opinion as to whether a lay person who is not trained in this area would perceive the nativity scene as a sacred religious symbol or otherwise? A. Well, I think the commemorating or the noting of a birth in this way is very unusual. I may be wrong but my best recollection is that I don't know of any other historical figure whose birth is represented in such a manner as this. It's very unusual and the reason I think that it is done this way is because the biblical account of the birth of Jesus is a combination both of historical facts and the faith of the early church. The early church in writing that section of the bible was not only relating historical facts but it was making a statement about those historical facts and the creche is clearly a statement about the nature of the birth aside from the sheer physical birth of Jesus.

Q. So in your opinion then would you say it would be reasonable for a member of the public to view this scene as a religious symbol? [99] A. Anyone at all familiar with Christianity would recognize that it's a statement about the nature of Jesus. Anyone who is not familiar with Christianity would certainly regard it as rather extraordinary situation. The animals are, the presence of the animals, the shepards, kings all in combination, that's very unusual.

Q. What do you mean "extraordinary," would you explain? A. Well, the mere presence of kings and shepards is historically almost impossible. Kings did not associate with shepards and they most certainly did not do so in a setting of, before, in front of a baby recently born. The presence of angels, almost anyone in the Judao Christian culture, larger culture, would recognize that that is a religious symbol, it's quite clearly religious.

Q. So you're saying that the meaning of the nativity scene cannot be divorced from its religious origins, is that correct? A. I don't see how it can be because it comes out of the New Testament as Christians call it, the New Testament statement about Jesus, it's not a recording of historical facts. It's a statement about Jesus.

Q. Now you have also indicated, Reverend Ramsbey, that you're a minister in a Methodist Church, does the Methodist Church use nativity scenes as part of its [100] worship? A. Oh, yes, very clearly.

Q. Did you participate in a press conference or a statement to the press regarding your feelings about this suit? A. Yes, I was one of about ten clergy who made a statement following the introduction of the suit and following the Mayor's press conference to express a pastoral concern and to try to express also our concerns that we were very uncomfortable with government taking over what we regard as our symbols and using them for essentially their own purposes whatever they might be, however, they might be in terms of good will but they were still not being used by the group to which they belong, the churches and individual persons.

THE COURT: Reverend, was this a prepared statement?

THE WITNESS: Yes, it was.

THE COURT: Was it published as such?

THE WITNESS: I believe it was published in the newspapers, yes.

THE COURT: Do you have a copy of it?

THE WITNESS: I do not but I believe counsel has.

MISS BLANDING: Your Honor, I had a copy of [101] it but I can't locate it.

THE COURT: Does this statement reflect your personal views?

THE WITNESS: Yes, it does, I helped to draft most of it.

THE COURT: Well, in its entirety does it reflect your personal views?

THE WITNESS: Yes, it does.

THE COURT: Do you so testify as to the contents of that statement?

THE WITNESS: To state that it does represent my views?

THE COURT: Right.

THE WITNESS: Yes, I will do that.

Q. I will show you this, is this the statement you're referring to, Reverend Ramsbey? A. Yes, it is.

Q. And what's the significance of the names on the bottom? A. These are clergy persons who were willing to indicate that they agreed with the statement as it was presented to them. There are ten names.

THE COURT: I'd like to know what that statement is. I'm speaking of it not as to the other ministers which might evoke some comment as to whether it's hearsay or not as to them but as to this gentleman [102] that he said it's his statement and I would like him to tell me what that statement is as representing his statement. Will you give it to him so he can read it to me.

THE WITNESS: Would you like me to read it in its entirety?

THE COURT: Yes.

THE WITNESS: "We clergy of several religious traditions wish to express a pastoral concern growing out of the controversy surrounding the display of a nativity scene with city funds in Pawtucket. Our concerns are several noted below. While the festivities, light and generations of good will in this season have roots in both religion and secular tradition, the creche is a specifically religious symbol. Our country while deeply influenced by Judao Christian heritage is not itself Judao Christian but is pluralistic consisting of many rich religious traditions and recognizing the value of all. Government in our country wisely recognizing the diversity of these traditions was set up to steer clear of embracing any while protecting the religious freedom of all. We as pastors have a responsibility to educate our people in the history of religious strife and the futility of imposing religious beliefs on the [103] human conscience. The specifically religious observance of this holiday period belongs in our homes and in our churches

and synagogues. Although there are public recognitions of this glad season they should not be confined to those symbols and traditions which are not—" I'm sorry— "they should be confined to those symbols and traditions which are not identified with any one group. We call upon our public officials not to exploit the strong sentiments associated with religious festivals and divide majority from minority. Rather we hope they will raise to a states person like position and avoid the insensitivity of foisting upon others any specific religious traditions. In this way the true joy of the season can be appreciated by and made meaningful to the widest diversity of people."

MISS BLANDING: I have no further questions, Your Honor. I'd like to move to introduce the statement as an exhibit.

THE COURT: All right, no objection, it may be marked.

MR. McMAHON: Please, Your Honor.

THE COURT: She's moving the introduction of the statement. I assumed you had no objection.

MR. McMAHON: Yes, I do object, Your Honor, I'd rather keep it as it is.

[104] THE COURT: Sustained. It's read into the record anyway, it's there.

MR. McMAHON: That's right.

Cross Examination By Mr. McMahon

XQ. (By Mr. McMahon) Dr. Ramsbey, I take it you wold agree, would you not, that a nativity scene in a Methodist Church serves a different function from the nativity scene at the Hodgson Park display? A. I'm not sure, I think that it serves a different function, it's in a different setting but I don't think, I think it's the same function.

XQ. Doesn't the setting have a lot to do with the function, isn't there a difference between going to worship, for example,

and going to shop? A. Certainly but I think the symbol in that case remains the same regardless of its setting, I don't see a difference.

XQ. But didn't you say that you considered that the religious symbolism of the nativity scene was being demeaned in this kind of display which we have in this suit? A. Yes, by its association with other secular or non-Christian symbols, yes.

XQ. In other words, in its setting? A. Yes, that's true.

[105] XQ. And doesn't every symbol in some way or other make a statement of some kind? A. Yes, particularly about the nature of groups, yes.

XQ. Now what kind of symbol would you say, what kind of statement would you say Santa Claus makes? A. Santa Claus I think probably represents a secularized symbol of large of good will, of seasonal good will, of gift giving. I think our Santa Claus draws as much from Clement Moore as it does from St. Nicholas in the fourth century.

XQ. But St. Nicholas was a religious figure, correct? A. Yes, he was but I, most people who are familiar with Santa Claus aren't even aware of who or what were the circumstances of St. Nicholas.

XQ. He was a bishop, right? A. Yes, right, that's correct.

XQ. And the uniform represents a bishop's vestments, doesn't it? A. I believe they may well, yes, the red particularly but may I just add that I think it has been largely transformed again by Clement Moore in the last century into an almost secularized elf like figure today.

XQ. What kind of a statement do you think the snowman makes? A. Well, I'm not sure the snowman is a symbol really.

• • •

[106] A. Yes, it is, it is used but I'm not sure that it represents any group. What I indicated earlier was that what I consider to be the secular or the profane symbols belong to almost any

group. They're things which belong to all of us. Snow, for example, belongs to all of us so thus snowmen do as well.

XQ. And the closer that symbol remains with the group the stonger the statement, correct? A. Yes, very definitely.

XQ. So that the statement that the nativity scene makes in a Methodist Church is a far different statement from what it would make if it were in Sears Roebuck department store? A. Well, there you're speaking of the group as a physical entity, a building, but the group is in fact whoever the people are who see that symbol.

XQ. But the people who go to Sears department store go with a completely different attitude from people who go to the Methodist Church to worship, do they not? A. That's right. I think that's one of the reasons Sears for example or any department store doesn't use creches very often in its advertising because in fact that would be so offensive to people that they would reject it. Yet Santa Claus, Christmas trees and so on are quite frequently used to sell things.

[107] XQ. Well, some of the religious symbols of Christmas are also used in shopping malls and the like, are they not? A. It's rather uncommon to see, all right, yes, they are used but it's uncommon to see them used for another purpose, that is, to sell things.

XQ. And this is one of your objections to the Christmas display in this case, to the use of the nativity scene in this case, is it not, that it's being used to sell things? A. Not primarily although from some of the testimony I think that it is being used for that purpose at least in part.

XQ. In the statement you read didn't you say, or perhaps it was your own, no, I'm sorry, it was your own comment, not the statement, didn't you say you were uncomfortable with government taking over religious symbols and using them for the government's purposes? A. Yes, I did say that.

XQ. So the government's purposes are different from the purposes of the religious group, right? A. Not necessarily.

The government may have more than the single purpose. A government after all serves all of the people and any religious group only serves a segment of that. Thus the government has many purposes for putting it there, one of which may be to enhance [108] the downtown business area. Another may be to create good will or a feeling of good will.

XQ. But it's not primarily a religious purpose and that's why you object to its being demeaning, isn't that correct? A. That is in part correct, yes.

XQ. Now the statement which you read into the record, had you ever made a public statement like that before, Doctor? I mean at a press conference for publication. A. I can't think of a time right off the top of my head that I've done quite that before, certainly not associated with the holiday season.

XQ. And that was a press conference held after this suit was brought, is that correct? A. Yes.

XQ. And it was in response to the press conference which the Mayor had after the suit was brought, correct? A. Partially, it was also in response to a lot of people being upset by both conditions, both the lawsuit and the Mayor's statement, yes.

XQ. Going back to my further questioning, Doctor, what function do you think all the Disney characters play as symbols in the Christmas display at Hodgson Park? A. I think they represent festivities, good will and joy of the season which belongs to all of us.

[109] XQ. And the same would be true of Christmas bells, Christmas trees? A. Bells perhaps less so but Christmas trees, yes. Bells are associated with churches so they're still more of an attachment there. Trees go way back in history to pre-Christian celebrations in northern Europe with the use of the evergreens and holly and so on.

XQ. Didn't the Christmas tree at one time also have a religious significance? A. Well, it was religious for those people way back there centuries before Christianity that the

trees which stayed green had a particular significance to the peoples of northern Europe and the druids and these people and so Christianity adapted the Christmas tree to its own purposes and gave it a special meaning for Christians but it has become resecularized by taking on a kind of usefulness to a lot of people.

XQ. Isn't it a fair statement, Doctor, that the entire Christmas national holiday is a secular celebration with a religious heritage? A. It is in part, it is not entirely. It still has remnants of it which are deeply religious and only associated with Christianity. It has other parts of it which belongs in a sense to the whole culture.

XQ. But you don't deny that it's a secularized national [110] holiday, do you, Doctor? A. It has been secularized but it's not entirely secularized, yes.

XQ. Well, what about Thanksgiving, Doctor, aren't there people who treat Thanksgiving as a primarily religious holiday? A. I'm sorry, I'm not sure I understood the question.

(Previous question read back.)

A. Yes.

XQ. But nevertheless as far as the nation as a whole is concerned you would not call Thanksgiving a primarily religious holiday, would you? A. No, I would not.

XQ. Aren't there people who treat Memorial Day as primarily a religious holiday? A. It certainly has strong religious overtones. I don't know if I would say primarily but there's strong religious elements in that, yes.

XQ. But as far as the nation as a whole is concerned it's a primarily secular observance, isn't it? A. Yes.

XQ. And the same could be said for Veterans Day? A. Yes, but not Easter.

XQ. Excuse me? A. But not Easter.

[111] XQ. Easter is not a national holiday, is that correct? A. Right, but it always appears on a Sunday and it's always a kind of a national recognition of the fact that the

day is occurring but quite unlike some of the holidays which have been partially secularized Easter has been far less secularized and I think the distinction is a matter of degree, sir, not of a radical difference.

XQ. Isn't the distinction that Easter has never been declared by law to be a national holiday, isn't that an important part of the distinction? A. Well, Good Friday has been declared by state law to be a holiday in practice, in terms of release of children from school. Now that's in part a movement in the direction of secularizing. This process is going on all the time.

XQ. Are you saying, Doctor, that Good Friday is a legal holiday in some places? A. No, it's not a legal holiday but most schools in the state of Rhode Island close on Good Friday which includes people of all different religious persuasions.

XQ. Well, schools close on Sunday too, don't they? A. Yes.

XQ. Sunday is a religious day for many, many people, is it not? [112] A. It certainly is.

XQ. The fact that schools close on Sunday does not mean that the church has secularized the religious observance of Sunday, does it? A. It does mean the society has utilized what was originally a religious day, the Sabbath, and converted it into a secular day of rest.

XQ. And that's essentially the same process that's occurred with Christmas, isn't it, Doctor? A. To some degree, yes, but I think a distinction can still be made between those elements which have been secularized and those which still remain with a largely religious aura.

XQ. Which is also true of Memorial Day, Veterans Day, Thanksgiving, at least those three, right? A. Yes, with regard to Thanksgiving I've always been curious as to how one can celebrate Thanksgiving in a totally secular light, to whom does one give thanks?

MR. McMAHON: Perhaps to the local football team. (Laughter)

THE WITNESS: Perhaps so.

MR. McMAHON: No further questions, Your Honor.

[113] *Re-Direct Examination By Miss Blanding*

Q. (By Miss Blanding) Reverend Ramsbey, Mr. McMahon has asked you a great many questions about degrees of secularization of different aspects of Christmas. Didn't you testify that the potential for secularization of the nativity scene was one of your objections to the government including it in this display? A. Yes, it is because as we talked, discussed during the testimony, the Christmas tree which one time was almost exclusively used by Christians has now taken on a much wider use by others and has lost the larger share of its specifically religious meaningful Christians.

Q. And you're concerned that the same thing may happen to the nativity scene? A. Yes, I am, that's particularly when it's used in that way. I think if it remains in our homes and in our churches that's not likely to happen but it is likely to happen once it becomes either used by the government or by commercial interests.

Q. Now as to the setting of symbols. If a symbol is associated with one group, for instance the nativity scene, is used by another group in some fashion does its use by the second group mean that all of a sudden it's not associated with the first group? A. No, because, but it just may affect that process of [114] secularization, but no, certainly it continues to be used. I continue to see the creche being very central to Christian celebration of the season.

MISS BLANDING: I have no further questions, Your Honor.

THE COURT: Tell me, Reverend, do you equate the nativity scene to Veterans Day, Memorial Day, Thanksgiving Day?

THE WITNESS: The nativity scene?

THE COURT: Yes.

THE WITNESS: No, I do not, I think it's—

THE COURT: Do you equate it to Santa Claus?

THE WITNESS: No, it's associated with Santa Claus but not equated, no.

THE COURT: Well, tell me how you draw the distinction when you said that these, at least Veterans Day, Memorial Day and Thanksgiving have religious connotations?

THE WITNESS: All right, I think the distinction comes from the degree to which the symbol still says something significant about the religious faith of its origin and I continue to see the creche or the manger scene as making a very significant statement about the nature of Jesus which is what distinguishes Christians from other groups, am I [115] understanding your question?

THE COURT: Well, I don't want to press it. You were asked by counsel about Veterans Day, Memorial Day and Thanksgiving Day and you conceded that they are at least in part religious and I'm trying to find out from you how you distinguish them, if you do, from the nativity scene.

THE WITNESS: Well, I would distinguish them on the basis that any kind of a holiday which has its origin in holy day becomes a kind of celebration of a whole group of people and therefore, say the 4th of July, the flag takes on a strong symbolic representation of the nation, that group of people. The flag then in that scene represents all of us but the creche is more specifically associated with one group.

THE COURT: Anything further, Counsellors?

MR. McMAHON: Just one short question.

XQ. (By Mr. McMahon) But the creche is just one of many symbols which is part of the overall celebration of Christmas, is that not correct? A. It is.

Re-Direct Examination By Miss Blanding

Q. (By Miss Blanding) Reverend Ramsbey, in an attempt to clarify distinctions between Veterans Day and Memorial Day and Thanksgiving, Christmas has its origin with [116] Christians, is that right? A. Yes, excuse me, although the celebration of Christmas on December 25th has its roots in the pre-Christian religion, the selection of that particular date as a date on which to celebrate, it goes way back.

Q. In terms of the celebration of the birth of Christ, is that founded or rooted in a particular religion? A. Yes.

Q. And that would be? A. Christianity.

Q. Are any of those other holidays you mentioned founded or rooted in the same way on the tenets of a particular religious faith? A. If I'm not mistaken Thanksgiving was established by Presidential proclamation by Abraham Lincoln and Memorial Day I think was also established by government decree. Those do not have roots so far as I know in religious traditions although they recognize religious traditions.

MISS BLANDING: Thank you, Reverend.

Re-Cross Examination By Mr. McMahon

XQ. (By Mr. McMahon) Well, Doctor, though isn't Thanksgiving associated with the Pilgrims? A. Yes.

XQ. And doesn't that have a religion, historical religious, [117] fairly specific historical religious association? A. I think it does but in contrast the Pilgrims refused to celebrate Christmas because they thought it was a pagan holiday. In other words, they being very religious people felt the holiday had been taken away from the pagans and refused to celebrate for that reason. In other words, they held it to be, the birth of Jesus, to be too important to be a legal day.

XQ. So that people who celebrate, historically celebrated Thanksgiving as a religious holiday considered Christmas a pagan holiday, is that correct? A. Yes.

XQ. But our roots in the celebration of Thanksgiving do in fact go to the religious tradition of the Pilgrims? A. Yes.

XQ. And that's a fairly definite association, is it not? A. I think so, yes, you're correct.

MR. McMAHON: Thank you.

MISS BLANDING: Plaintiff rests.

(Witness excused.)

THE COURT: Who's your next witness?

MISS BLANDING: We rest, Your Honor. The plaintiff rests.

* * *

[1] FRIDAY, FEBRUARY 6, 1981

(Court Convened)

MR. McMAHON: Defendants would like to call Mr. Myron Stoller.

MYRON STOLLER,
having been first duly sworn, testified as follows:

Direct Examination By Mr. McMahon

Q. Mr. Stoller, what is your occupation? A. I am a merchant and corporate officer in the retail business.

Q. And what is the retail business with which you are connected? A. Men's wear.

Q. What is the name of it? A. Mike's, Incorporated doing business as Saltzman's.

Q. Mr. Stoller, I believe you said that you're connected with a business known as Saltzman's? A. That's correct.

Q. And where is Saltzman's located in the City of Pawtucket? A. 230 Main Street.

Q. And what line of merchandise does Saltzman deal in? A. Men's wear.

Q. How long have you been in the retail business in the City of Pawtucket, Mr. Stoller? A. Nine years.

[2] Q. And in your capacity in the retail business, is it part of your duties to determine from your competitors and from your customers the attitude of customers and businessmen which promote the commercial activities in downtown Pawtucket? A. That's correct.

Q. And in connection with your business, are you also associated with other retailers in downtown Pawtucket? A. Yes, I am in an organization called Pawtucket Plaza Associates.

Q. And what is your position in Pawtucket Plaza Associates? A. I am the president of the associates.

Q. And what is the function and operation of Pawtucket Plaza Associates? A. Coordinate promotions and the retail activity in the plaza area of Pawtucket.

Q. And would you generally describe for the Court what the plaza area embraces in downtown Pawtucket? A. The plaza area actually starts right at Route 95 and extends up to Broad Street and Dexter Street.

Q. It includes basically the entire retail downtown area of Pawtucket, is that correct? A. That's correct.

Q. And I'll ask approximately what percentage of annual retail sales in the City of Pawtucket is done during [3] the Christmas season? A. Approximately 25 percent of our yearly business is done between the period Thanksgiving through Christmas.

Q. And in connection with that retail business, what is your position as an individual retailer and the position of your association with respect to Christmas promotions? A. It's very important to us, in fact, in the retail business in the nine months of the year, you try to stay even and all our profits are generated in the Christmas season.

Q. And do you and your other members encourage the promotion of Christmas through decorations and displays? A. We do.

Q. And do you as an individual retailer and the members of your association have a position with respect to the city spon-

sored display at Hodgson Park insofar as it affects your business? A. We do.

Q. What is that position? A. We are highly in favor of it and it has created an atmosphere that we enjoy and it brings a Christmas spirit to the populus of the area.

Q. And what do you consider to be the principal impact of that display at Hodgson Park? A. It's a draw for people from miles around to come and see it, and anyone that comes to see that is a potential [4] customer for the merchants in town.

Q. Now I will ask you, what if any impact in your view as an individual retailer and in the view of your associates the nativity scene adds to the Christmas display? A. Absolutely nothing.

THE COURT: What was that question, please, Mr. Spertini, will you repeat it?

(Previous Question Read)

Q. By the way, Mr. Stoller, what is your own religious affiliation? A. I am Jewish.

Q. Do you personally have any objections to the inclusion of the nativity scene in the Christmas display? A. Absolutely not.

Q. I'll ask you whether any of your colleagues in the association are also Jewish? A. Yes, they are.

Q. Do you know whether any of them have ever expressed any reservations concerning the inclusion of the nativity scene? A. They have not to me.

Q. I will ask you whether prior to the institution of this lawsuit you ever became aware, either through your customers or through your colleague retailers, of any [5] complaints about or controversy concerning the nativity scene in the Hodgson Park display? A. Absolutely not.

Q. I will ask you whether your association coordinates with the City during the Christmas season in scheduling the erection of the Hodgson park display? A. Yes, we do.

Q. And what does that consist of? A. Well, we're always trying to get the City to put it up earlier and earlier in the year.

Q. What is your position with respect to the time you, your association would like to have it put up? A. We would like it either just before or right after Thanksgiving.

Q. And is that earlier than the City established the display this year? A. Yes, it is.

Q. And did the City contact you concerning the timing for the opening of the display? A. Yes, they did.

Q. And what was the substance of that discussion? A. They asked if I would rather have it on display on the 6th or the 13th and I said the 6th is too late for me, but if that's the earliest you can do it, that would be all right.

[6] Q. And the basis for your position is to encourage retail sales as early as possible in the Christmas season, is that correct? A. That is correct.

MS. BLANDING: Your Honor, I object. I think that's leading the witness.

THE COURT: It is leading but we'll let it stand. Try to watch it, Mr. McMahon.

Q. Is your association and the other retailers in downtown Pawtucket, I'll ask you whether you have an ongoing relationship with the City in promoting your commercial activities? A. Constantly.

Q. Will you describe generally what that consists of throughout the year? A. We meet with the City, oh, in the past year probably met six or eight times, and the City has been a great help to us in helping promote the plaza. The Mayor, his assistant, the Planning Board, all departments of the City and the merchants association have been in contact in ongoing discussions on promotion.

McMAHON: No further questions, Your Honor.

Cross-Examination By Ms. Blanding

Q. Mr. Stoller, you testified that you believe that the [7] impact of the nativity scene added absolutely nothing to the Christmas display in Hodgson Park, is that right? A. That's correct.

Q. So therefore, wouldn't you say that if the nativity scene was not part of that Christmas display, that the entire Christmas display itself with the lights and all the other fixtures and the Christmas trees, the Santa Claus, the whole bit, would still serve the exact same purpose of drawing business to the Pawtucket downtown area? A. That's correct.

Q. Now I believe you have also testified that prior to the suit that you had no awareness of any controversy regarding the City's erection of a nativity scene, is that correct? A. That's correct.

Q. And you testified that to your knowledge the Pawtucket Plaza Association had no awareness of that, is that correct? A. That's correct.

Q. Are you normally in a position either as an individual retailer or as an officer of the Pawtucket Plaza Association to receive complaints about city sponsored displays from your customers? A. Through the grapevine we would hear of these things, yes.

Q. Meaning it would not come from customers directly but [8] you would hear about them second, third of fourthhand down the line. A. They conceivably could be direct from customers or from city officials.

Q. The city officials would normally make you aware that customers had complained to them about their own displays for various holidays I'm talking about? A. Very possibly, yes.

Q. And customers normally would complain to you, saying if the City had a Fourth of July celebration that they did not like the particular way the City celebrated it? A. Oh, we would hear about it, yes.

Q. From your customers? A. Yes.

MS. BLANDING: I Have no further questions.

MR. McMAHON: No questions.

(Witness excused.)

MR. McMAHON: Mr. Dennis Moore, please.

DENNIS W. MOORE,
having been first duly sworn, testified as follows:

Direct Examination By Mr. McMahon

Q. Mr. Moore, what is your occupation? A. I'm the Executive Director of Downtown Pawtucket Revitalization, Inc.

Q. And what is that organization? [9] A. It's a newly formed corporation which is involved strictly with the promotional aspect of downtown Pawtucket.

Q. And how long have you been associated with this organization? A. Since December 8th.

Q. And what was your occupation prior to your affiliation with this group? A. I was a program manager for the Pawtucket Redevelopment Agency for 10 years since August of 1970.

Q. And that Pawtucket Redevelopment Agency is a public agency? A. Yes.

THE COURT: Let me understand; are they paid out, out of the City of Pawtucket treasury?

THE WITNESS: My new position, Your Honor?

THE COURT: Yes, as Executive Director; in other words, are you an employee of the City of Pawtucket?

THE WITNESS: The project is funded by the City of Pawtucket, the Chamber of Commerce, downtown business interests, banking, area manufacturers.

THE COURT: Your check that you receive, where does it come from?

THE WITNESS: It comes from the City of Pawtucket.

[10] Q. And where is your office?

THE COURT: One other question, if you don't mind, I want to get a perspective on it. How are you hired, who is the deciding force in whether or not, or who was the deciding force in getting you this appointment?

THE WITNESS: I was interviewed by a three-member group of individuals who had been involved in a task force set up by the Chamber of Commerce. This process had been ongoing for approximately 14 months, but my actual employment was decided by a three-member group.

THE COURT: They are the ones who dedided you should have this job?

THE WITNESS: Yes, sir.

THE COURT: And who are these three people?

THE WITNESS: Members of the group were Woody Kahn, the President of Apex, Bob Allchiard, the President of the Chamber, Jack Nixon, Regional Vice President of InBank.

THE COURT: Okay, thank you very much.

Q. And where is your office, Mr. Moore? A. My offices are located at 42 Park Place. That's the offices of the Blackstone Valley Chamber of Commerce.

Q. So your principal affiliation in terms of your daily [11] duties is with the Chamber of Commerce, is that correct? A. Yes, it is.

Q. And I believe you testified that the purpose of your organization is the promotion of downtown Pawtucket, is that correct? A. Yes.

Q. Would you please describe what those promotional activities involve? A. Generally the areas that we are concerned are the obvious promotional events, the development of a 12-month promotional calendar for downtown, the marketing of downtown as a regional center in the areas of culture, recreation, retailing, office space and financing. We're also involved in developing of creative financial strategies for getting new clients into the downtown area.

Q. And as part of those promotional activities, does your organization have a position with respect to the function of the City's Christmas display at Hodgson Park? A. Well obviously in a development of the 12-month promotional calendar, the Christmas promotion events are geared around the activities at Hodgson Park in addition to retail events which fly off of that.

Q. And does your organization have—strike that. [12] And what, in the view of your organization, is the principal impact of the Hodgson Park Christmas display? A. We consider the Hodsgson Park a key link in bringing commerce into the City. It is visible from 95, the tree, the lights. We have the potential of 100,000 cars a day traveling 95, if we can attract a percentage based on that Christmas display, that is helping the commercial aspects of the retailers downtown.

McMAHON: No further questions, Your Honor.

Cross-Examination By Ms. Blanding

XQ. Mr. Moore, you testified that the Pawtucket Revitalization, Inc. was a combination effort among the City and the business and the Chamber of Commerce. Where do your directives come from or guidelines as to how you should run the revitalization association? A. Okay, we have a 16-member Board of Directors which has been appointed, five members appointed by the City of Pawtucket, five members appointed by the Chamber of Commerce and six members appointed jointly between the City and the Chamber.

XQ. And the Board will meet regularly and vote on ideas that they want you to carry out, is that it? A. Yes, the Board has been broken down into five task forces involved in retail development, office development, [13] financing, marketing and mall management. There are chairman of each of these task force and there is also an executive committee which is the official decision-making body of the corporation.

THE COURT: I assume that the three people who hired you are also members of this organization?

THE WITNESS: Two of the three are, Your Honor. The third member, Bob Allchiard is the President of the Chamber, obviously with those duties he dosen't have enough time to get involved in this, but Jack Nixon and Woody Kahn are both members of the Board of Directors.

XQ. And is the membership in the task force determined in any way by dividing it up, say, one member from the City, one member from the Chamber, one member from retail, or is it—how are the task forces set up? A. No, the decisions on the makeups of the various task forces was made based on the knowledge of the individuals on the Board of Directors. That decision is made by myself and also the Chairman of the Corporation, E. Swift Lawrence.

XQ. And through the task forces come up with suggestions that you should follow? A. Yes, meetings are scheduled. Obviously, the initial conduct of the corporation, most of the work is being [14] done right now so that the individual task forces are meeting weekly right now. The task forces come up with various statements of objectives which are then approved by the Executive Committee and put into action.

XQ. Now you testified, I believe, that the revitalization association is very interested in the Hodgson Park area because of its location and proximity to Route 95, is that right? A. Yes.

XQ. And you believe that that proximity to 95 and to the downtown area results in a great many people viewing the displays that would be set up there? A. Yes, I do.

XQ. And you believe that the primary impact of the Christmas display is to attract people, excuse me, attract commerce into the downtown area, is that right? A. Yes, I do.

XQ. And do you feel that that impact would be affected at all if the entire Christmas display remained the same except that the nativity scene was not there? A. Repeat that question?

XQ. Do you feel that the impact of bringing commerce into the downtown area would be affected at all if the entire

Christmas display with the lights and all of the other elements were still present but the nativity scene was not? [15] A. No, I don't.

MS. BLANDING: I have no further questions, Your Honor.

MR. McMAHON: No further questions.

(Witness Excused)

DAVID H. FREEMAN,
having been first duly sworn, testified as follows:

Direct Examination by Mr. McMahon

Q. Dr. Freeman, by whom are you employed? A. University of Rhode Island.

Q. What is your position? A. Professor of Philosophy.

Q. And would you please describe for the Court your educational background, Dr. Freeman? A. Yes, I'm a graduate of Calvin College for a Bachelor of Arts. I have an M.A. and a Ph.D. from the University of Pennsylvania; I studied at the Freed University of Amsterdam for more than a year.

Q. And those degrees at the University of Pennsylvania were in what field? A. In philosophy.

Q. And do you have any publications, Dr. Freeman? A. Yes, I've written several books, Philosophical Study of Religion, a textbook in logic, a book on recent trends in philosophy and theology, Know Yourself and numerous [16] articles and translations.

THE COURT: Excuse me, what was the first book, Doctor?

THE WITNESS: Philosophical Study of Religion.

Q. How long have you been on the faculty of the University of Rhode Island? A. Since 1957.

Q. And since 1957, would you please describe for the Court what positions you have held on the faculty at the University

of Rhode Island? A. I was chairman of the department for about 10 years of that time. I have been on various committees, the secretary of the AUP, a member of the faculty senate, a chairman of the senate salary committee and on the deans' advisory committee, president's advisory committee, among others.

Q. And what courses do you teach at the University of Rhode Island? A. Currently I'm teaching the philosophy of religion. In the course of the years, I've taught most every undergraduate course.

Q. Has your professional work involved any research with respect to the philosophical aspects of religion? A. Yes, in addition to philosophy of religion, I meant to [17] say I was teaching comparative religion at the moment. My recent sabbatical took me to India, Japan, Burma, Korea, China to study, specifically to study religion.

Q. And the research in that foreign travel involved specifically what aspects of the study of religion? A. I visited many temples and talked to priests in Buddhists and Hindu faiths primarily.

Q. And did this research include the study of religious symbolism? A. Yes, when I entered temples, I took careful note of the art and tried to trace the meaning of the statutes in terms of the Hindu, Buddhist theology.

Q. Doctor, will you please describe for the Court your own religious background? A. I'm a Protestant, my father was brought up in the Jewish faith, my great-grandfather on my mother's side was a rabbi.

Q. I will ask you, Doctor, to describe for the Court in definition terms what is a symbol? A. A symbol is a sign that refers to something beyond itself. It has, it seemed to me, two aspects: one would be objective, that it refers to something in a particular realm or a dimension of our experience; the second would be the subjective response of the person who views the symbol, and this would vary depending upon his own [18]

conceptual background or the world in which he lives, what his beliefs are, his attitudes, his whole cultural milieu.

Q. Generally speaking, what is the function of a religious symbol? A. A religious symbol doesn't occur in a vacuum, it occurs in a context and its function would be to evoke a religious response, an attitude of worship of awe, a respect for the holy, a respect for the sacred.

Q. Now, would this religious response occur in any setting? A. Hardly. I've never seen people in a museum looking at a religious, what was religious in origin as a painting assume an attitude of worship. The response there would be aesthetic. I would say the same thing in a concert hall; Ave Maria in a church or at a wedding or at a funeral might evoke a religious response, but in a concert the response would be aesthetic, so I'd say that whether it evokes a religious response depends upon the attitude of the person viewing that symbol and where it's found.

Q. And with respect to the various symbols of Christmas, I will ask you whether or I will ask you which of them would qualify as religious symbols? A. Originally they all would, but it would be committing a fallacy to trace the origin in deciding whether it was [19] a religious symbol on that basis. It seems that Santa Claus at one time was religious, the star on the Christmas tree, the lights are substitutes probably for candles that are associated with church usually, and I don't know whether the snowman and other symbols of that sort have come in, the Christmas tree in origin was religious and I think that many people bemoan the fact that these symbols have lost their religious meaning and it seems that the nativity scene is in that category for most people. For many, it still retains its religious significance in another context.

Q. Would you please explain what you mean by the nativity scene losing its religious meaning? A. Well, in the context you can't take, it seems to me that you can't take a part of a total display out of that context and view it in the abstract.

When I looked at pictures of that display in the park, I see in the background Santa Claus and the reindeer and the location of it between two shopping centers. People there, it would seem to me, are not going there to worship or to pray, they're going there to shop, and what the function that it would have for most people at least, the great majority if not all, would be to participate in the Christmas spirit, brotherhood, peace and let loose with their money.

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[28] *Cross-Examination by Ms. Blanding*

* * *

XQ. But doesn't that scene tell a whole story in and of itself? A. I don't believe so. More would be needed.

XQ. Are you saying that if I stood in front of a life-size nativity scene, that I would not look at it or any reasonable person educated in the Judeo-Christian culture would not look at it and see it as telling an entire story?

MR. McMAHON: Well, I'm going to object on the grounds that there's no evidence that this is a life-size nativity scene.

THE COURT: Overruled.

A. Would you mind repeating the question.

(Pending Question Read)

A. I would think that you'd be looking at that outside of a context, that's my whole point of my testimony, [33] that these symbols become religious in a context and in a different context they're not. If I'm looking at medieval art in a museum, of course the background of that art would be religious and anyone knowing that would know it's religious, but in that context that's not a religious symbol. Symbols function contextually.

XQ. So you're saying that it looses all meaning as a religious symbol, all significance as a religious symbol merely because it's not set in a religious setting? A. I would say so. I wouldn't say all, most.

XQ. But it would still retain some of its religious? A. For some people the subjectivity of people that what they bring to it would vary, I can't tell what it would do. With me, it doesn't evoke any religious sentiment.

XQ. But wouldn't you say it would be reasonable response to a person to still see it as a religious symbol or still realize its religious meaning even though it appeared in out of context? A. If by reasonable you mean there is nothing pathological about it, it's certainly a possible response.

XQ. Would it surprise you that a person might have that response? A. No, not at all.

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[36] XQ. Would you define that response that I suggested surprising? A. No, I wouldn't be surprised. People repond any number of ways.

XQ. Now I believe you testified that to many the nativity scene would still have religious significance, is that right? A. In a religious context, yes.

XQ. And you testified that many of those people might be upset at seeing the nativity scene which they viewed as a religious symbol cast into the middle of a secular display, isn't that right? A. Some would, yes.

XQ. And wouldn't that be because even though it was in the middle of that secular display, they still saw it as a religious symbol that belonged to them? A. Possibly, yes.

MS. BLANDING: If I may just have a minute, Your Honor? (Pause) I have no further questions, Your Honor.

Redirect Examination By Mr. McMahon

Q. Referring to that last question, Doctor, wouldn't the objection of those who saw it in this secular setting [37] be that their religious symbol had become secularized? A. Yes, that would be their objection and they might object to the whole display of Christmas. My father is a Presbyterian minister and he would object to the whole display.

THE COURT: Anything further?
MR. McMAHON: No, Your Honor.
THE COURT: Thank you, Doctor, I think that does it.

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PLAINTIFF'S EXHIBIT NO. 1

PLAINTIFF'S EXHIBIT NO. 4

14 THE EVENING TIMES (Pawtucket, R.I.) SATURDAY, DECEMBER 27, 1980

LETTERS:

Don't fight 'Little Baby Jesus'

Your editorial said it all, but one thing I cannot comprehend.

Who are these people to tell the rest of the citizens, who are well pleased, what we should and should not have on display? What walk of life dictates what is good for the other people? Let them ask the people who wait for the bus every day whether or not they like it.

I love Christmas season, every minute of it, and everything about it.

"ACLU," whoever you are, if you like the limelight why don't you do an act of charity instead of trying to fight "Little Baby Jesus" in the manger?

The longer I live, the less I understand people who protest the important values of life.

— Mary Monaghan
Pawtucket

Let's gather around the crib

Let's take our hats off to our courageous and outspoken Mayor, Dennis M. Lynch, who has come to the defense of all Christians in the controversial crib scene.

At this time and age, when we are surrounded with all types of misery and frustration, we all look to the newborn child for peace and a better world.

It is a sad commentary when such an organization as the ACLU can disrupt one of the greatest holidays, hiding behind the First Amendment. Again we must continue to give our moral support to a man who has the courage of his convictions.

Mayor Lynch, you are not alone in this fight. Millions of God-fearing people are on your team. Let's gather around the crib, wishing people of all faiths a greater future, with peace on earth, good will toward men.

— Pat Loughery
Pawtucket

Decorate with a flood-lit dollar

I am enraged and I am not going to take it any longer.

I wish to register my protest in the name of a segment of the long-suffering silent majority — the Christian and Jewish believers of Rhode Island.

Must our symbols of belief be constantly questioned and expurgated from public display by those who would split hairs on every issue?

These inanimate decorative objects of our religious persuasion are meant as a reminder to us of the true meanings of our special days of Hanukkah and Christmas.

Why would people who profess no belief feel threatened, proselytized or offended by something that has no meaning for them?

Perhaps the ACLU would raise an appropriate symbol of the Christmas, if I may still use the word freely, season: a gigantic, decorated and flood-lit dollar sign in every park.

I am really disillusioned by the courts' constant attempts not to offend the strident few at the expense of the convictions of the silent majority. The question is who is being protected from what and who is being persecuted?

Doesn't the very Constitution which guarantees separation of church and state also guarantee my right to worship freely? If our public symbols must be abolished are worshippers to be forced back into stealthily gathering in hidden places?

Please Christians and Jews of R.I., voice your protest against this callous sit-picking.

— Patricia A. Lassiter
Cumberland

What will ACLU ban next?

I would just like to say "I have rights and so does my family" and we want the Nativity scene to stay at the Hodgson Rotary Park.

I agree with your editorial wholeheartedly.

What next, ban the singing of "God Bless America" in public? Taking the words "In God we Trust" off our coins?

Citizens of Pawtucket support Mayor Lynch in his fight against the ACLU. He is fighting for your rights too.

ACLU, why don't you put your time, energy, and money to work and help the needy people in our community instead of trying to take down a harmless Nativity scene that only stands for love and peace on one of our most beautiful of holidays.

— Joan Guimont
Pawtucket

PLAINTIFF'S EXHIBIT NO. 11

"They prostrated themselves and did Him homage . . . presenting Him with gifts of gold, frankincense, and myrrh."
Matthew 2:11

Dear Myers Rymer's family,

May your happiness come from giving the Christmas message to others.

May we bless you in your effort to preserve the spiritual aspect of Christmas.

Sis Darlene DeBarnardo

Dear Mayor Lynch.

As Taxpayers, and life long residents, we Congratulate you on your determination to keep the Nativity Scene on display. Christmas Day is a national holiday and is celebrated as such. - The birth of Christ -

When the appointed time came,
God sent his Son,
born of a woman.
Galatians 4:4

Special Christmas Hope

I hope in God
the Christmas feast
as it comes round
once more
will bring you deeper
Faith and Love
than it ever brought
before!

Carl & Ellen Johnson
85 Cleveland St.
Paul S.D.

Dec. 18, 1980

Dear Mr. Mayor,

I applaud you! It's time that someone with courage stood up to the few who want to dictate to the majority as to what they can and cannot celebrate and revere in the way they wish to.

I wish you and your family a Wonderful Xmas and a very happy and healthy New Year.

Sincerely,

(Mrs.) Helen L. Rhoads

49 Lupine St.
Pawtucket, R.I.
02860

Dear Mayor Lyjack

Could it be that old lady O'Hair is behind the A.C.L.U.? Would think they'd find some charitable deed to work at - with all the poor around, instead of a christmas decorations - Christmas is Christ's Birthday - not only in church but out side too, we want that Christmas display on the river bank every Yuletide Sincerely

Delia Bellmeau

Dear Mayor Lynch,

We wish to thank you for standing up to the A.C.L.U.

As taxpayers of this city we want the Nativity Scene to continue to be displayed each Christmas as it has in the past.

It is Christ's birthday, and that is what we and the world would are celebrating.

May God's blessings surround you
Faith to strengthen you
Hope to encourage you
Love to embrace you
At Christmas and always!

Mr. & Mrs John Sita & Family
80 Blaisdell Ave.
Lawr. R.I.

TRINITY ASSEMBLY OF GOD

Pastor John A. Cooper

Meeting At
George J. Peters School
15 Mayberry Street
Cranston, RI 02920

Mailing Address
P. O. Box 3298
Providence, RI 02909
Phone: 943-3802

December 23, 1980

Mayor Dennis Lynch
City Hall
City of Pawtucket
Pawtucket, R.I. 02860

Choice greetings in Christ's name. It was a thrill to see a Public Official stand up for his convictions and that which is right concerning the nativity scene being placed in front of the City Hall. I only regret that the ACLU and all the land do not recognize the fact that this nation was founded upon Christianity. It was founded upon Jesus Christ. Our constitution was derived from a prayer meeting of all the people who had assembled there for that first Constitutional Convention. It is with great remorse that people who call themselves ministers of the Gospel of Christ could ever or should ever come out against such a ceremonious event as they have done so. Let me pledge to you our support in what you have stood for concerning the nativity scene there in Pawtucket. May God bless you.

In Service for Christ,

John A. Cooper

John A. Cooper, Pastor

JAC:ss

Thanks for sticking it
your guns! We're praying
for you!

A Christmas Gift

Mayor Dennis Lynch

will share in the fruits of

a Daily Mass

offered by the

Franciscan Friars

for a period of one year

beginning christmas day

at the request of

Lillian Morin

Signed For Fergus A. Healy, O.F.M.

St. Francis Chapel
20 Page Street
Providence, R. I. 02903

12-18-80

JAMES SMITH
106 FISKE AV
CUMBERLAND RI 02864

Dear Mr Taylor,

"Where is that one "Nation under God" our Forefathers spoke about, it is High time that people stood up to be counted, and that the Majority of our Judges got their Heads out of the Sand, and gave this Country back to God fearing people. "Righteousness still exalteth a Nation." my Wife & I want you to know that we are with you 100% in your stand. Bible reading is forbidden in our Schools, and so is prayer, what next?

Sincerely James & Jessie Smith

159

57 Redwing Street
Prov. R.I. 02907
Jan. 15, 1981

Mayor Dennis M. Lynch
Pawtucket, R.I.

Dear Hon. Mayor:

Though I am not of your City, I want to Congratulate you on your insistance of keeping the Nativity display in your City, for the Christmas Season. And my prayers will be with you that you will win this case in Court, to be able to have it in future years. I am somewhat skeptical of the presiding Judge who has a leaning towards the wrong side instead of the good, in my opinion.

But doesn't anyone realize that there wouldn't be any Christmas to celebrate if it weren't what the Chreche represents? Yet the merchants take great advantage of this Season to Capitalize on it.

"The Scrooge of Christmas 1980", as you well described them, have nothing to say about that.

It is unbelievable that some Ministers have banned together against this righteous scene, to side with the Am. Civil Liberties Union. Don't they remember that our first settlers came here for freedom of religion?

May "God" bless you in your efforts to keep "Christ" in Christmas and win this case against the American Civil Liberties Union.

Yours Truly,
Miss Angelina Magenais
(A concerned Senior Citizen)

Dear Mayor Lynch,

The controversy over the Nativity Scene in Pawtucket has upset my family and me. Just knowing, that a handful of atheists could actually get a court date for such a thing, makes me boiling mad.

We don't live in Pawtucket now but what is happening, goes beyond city limits. When a bunch of people strike out at God, they'll have to take on all of us.

Every time a handful of atheists unload their empty non-beliefs on us, they spit out separation of church and state. Separation of church and state, which was brought about by Roger Williams, wasn't intended to chase God away, to remove Him from all places. It was intended to keep the state or Government from forcing all people to worship when and where they were told. It gave the people the freedom to worship in their own way, in their own religion or not worship at all, if they chose.

Why do people keep using separation of

church and state in the wrong way? Roger Williams was a man of God, a minister. We have the right to worship whenever and wherever we want to and no one is taking that away from us.

I can't understand why they work so hard to prove God doesn't exist. Why do they work so hard for someone who isn't even there, in their opinion. I don't believe in Santa Claus, the Easter Bunny or the tooth fairy but I wouldn't do a thing to bring my non-beliefs alive. They do exist for some people, for children. I wouldn't set out on a campaign to take down Santa Claus statues or have a fit because city workers are paid to put them on display. As long as I know they don't exist, why would I get so bothered if others think they do.

Mayor Lynch, I don't speak out about many issues but when a handful ~~full~~ of cold blooded atheists strike out at my God, Jesus and my family and I are Roman Catholics

and we are so sick of hearing their stupid, empty ideas. They cannot take our freedom of Religion or freedom of speech away. They are not taking God out of this country.

I bet the atheists accept Christmas bonuses and their children receive gifts. They wanted all God related Christmas Hymns to be stopped in public places a few years ago. Don't they know there wouldn't be a Christmas if except for God. Why do they celebrate the birth of someone who doesn't exist. It certainly can't be the Santa Claus angle, cause he doesn't exist either.

When this goes to Court on Jan. 12th will the Court room be opened to the public?

Thank you for taking the time to read my letter.

Sincerely,

Sharon Hesson

22 alpine St.
Warwick, R. I. 02889

PLAINTIFF'S EXHIBIT NO. 12

'Let us see victory . . . over the ACLU'

I was very sadly shaken when I read the Dec. 23 news article reporting that so many ministers — who are really not ministers of the Gospel of Jesus Christ but ministers of a social gospel — would come out against the Nativity scene in Pawtucket, in support of the ACLU's (American Civil Liberties Union's) actions.

I regret that every Christian in America would not rise up against them and let us see victory in every situation over the ACLU in their activities. They are quite evidently set for the overthrow of our government, for the overthrow of Christianity, and for the overthrow of Judaism.

I believe that this nation was founded upon Jesus Christ as was evidenced through the Constitution of the U.S. which was derived from a prayer meeting of our forefathers. Nowhere in the Constitution does it state that there is to be a guarantee of separation of church and state or God and state. Anytime there has been a separation of God and state the state becomes the God, as is evidenced in Russia and other communist bloc nations.

Let it not be said that all Protestant churches agree with those very liberal, non-Christian ministers who would stand up with the ACLU. Trinity Assembly of God stands up and will be counted as one who will witness and serve Christ regardless of what all others may do. We support Mayor Lynch and the Nativity scene displayed next to the Pawtucket City Hall.

John A. Cooper
Pastor
Trinity Assembly
of God

Providence

PROV. JOURNAL 1/9/81

The Evening Bulletin, Wednesday, January 7, 1981

Letters

Did the ACLU go far enough?

Pawtucket Mayor Dennis M. Lynch has a perfect opportunity to emerge as a person of unprecedented, fine character, dedicated to the execution of those duties implicit in the nature of his high office. Instead he has chosen the role of stubborn protagonist of a popular, but unconstitutional principle.

In support of his stand, he offers nostalgia and precedent. Nostalgia is no justification for the imposition of one's will upon another. Precedent must be inspected constantly, reviewed, and revised if necessary.

The Pawtucket residents who have rallied to his support should earnestly ask themselves not "Has the ACLU gone too far?" Rather, have they, themselves, gone far enough? Have they really investigated the issue of separation of church and state?

While this predominantly Christian nation has come to accept the all-pervasive celebration of Christmas, with the Christmas tree and other non-religious decorations, the creche is a distinctly religious symbol, and, as such, should not be displayed in public places.

No one seeks to deny anyone the privilege of displaying in his home or church anything he wishes. Public, tax-supported institutions must, however, be representative of all members of a community, of whatever beliefs. Those hallowed halls may be decked with wreaths of holly, but never with religious symbols. I am equally opposed to the display of the Menorah in public places.

The world is composed of more than Christians and Jews, and such public displays are in poor taste. Two wrongs do not make a right. It would be gratifying to know that in Pawtucket, in the office of mayor there is a person of sensitivity, with a sense of justice, who would realize that the display of religious symbols in public buildings represents a travesty of justice and a public affront to the feelings of many constituents.

Gratefully, this is a country that will not tolerate religious persecution. The ACLU (American Civil Liberties Union) is to be commended and supported in its stand. The *Journal* should be reprimanded for labeling the ACLU "grinches," implying sympathy for the Lynch position. Perhaps it is Mayor Lynch who is the real grinch!

Clare Bensusan

Cranston

THE EVENING TIMES (Pawtucket, R.I.) TUESDAY, JANUARY 6, 1981

'Any fool knows that...'

When we read "Some clergy back American Civil Liberties Union suit" (Evening Times, Dec. 23, 1980), we were completely appalled by clergy making such statements if they are fully aware and up-to-date that church and state are one in this new decade of the 80s. If they are not dedicated to God and Christ, are they secretly striving for communism?

We agree that Mayor Lynch is so right when he says: "They miss the point." If these apparently communist-led inspired religious leaders ever had the experience in being in Washington, D.C., Boston, Mass., or Bethlehem, and had seen the life size of the Nativity, they would realize this and not be such ignoramuses. This practice has been going on for several centuries, not only in the USA but in Europe as well. When the church sanctifies this occasion, you cannot separate the church from the state — any fool knows that!

Our agreement was confirmed when we read Revelation 21:1-9: The New Heaven, the New Earth, the New Jerusalem — "...Whoever wins the victory will receive this from me: I will be his God, and he will be my son. But cowards, traitors, perverts, murderers, the immoral, those who practice magic, those who worship idols, and all liars — the place for them is the lake burning with fire and sulfur, which is the second death. One of the seven angels who had the seven bowls full of the seven last plagues came to me and said, 'Come, and I will show you the Bride, the wife of the Lamb.'..."

In closing, we will pray for your souls — as you sure need it. —

Alice Brickach
Pawtucket

Journal 12/19/85

Lynch espies 'Scrooge' under tree

By BARBARA CARTON
Journal-Bulletin Staff Writer

PAWTUCKET — The set was great — the snowy banks of the Blackstone River, near the city's Christmas Nativity scene, the plastic reindeer, the peppermint-striped lampposts and the tall pine tree.

MAYOR LYNCH

The casting was good, too: Dennis Lynch as the angry mayor, standing on a podium with clenched fists, shouting into a microphone about freedom, patriotism and Christmas good will.

And the house was packed: Sixty municipal workers, including Finance Director Richard Mumford and police Cmdr. Theodore King, stomped their feet against the cold and shouted things like "We're with you, Dennis."

"I love ya, baby," Lynch shouted back.

It reminded one bystander of the Phil Donohue show, where Phil goes out into an adoring crowd with his microphone. But it was, in fact, an outdoor press conference, called yesterday by Lynch to protest a court suit filed Wednesday against the city by the American Civil Liberties Union. The suit charges that the Nativity scene and its accompanying outdoor Christmas music violate the Constitution.

When he first heard about the suit Tuesday afternoon, Lynch responded in the privacy of his City Hall office by calling the whole thing "ridiculous" and vowing to fight it.

* * *

YESTERDAY, the fight spilled out of City Hall. Lynch surfaced with his troops and numerous bystanders along the riverbank at the scene of the alleged crime, five feet from

Turn to LYNCH, Page A-18

Lynch

Continued from Page One

baby Jesus, the plastic reindeer and ti straw manger, which had been propped into a vertical position by four Kobo ice hockey sticks.

And at 1:30 p.m., the appointed time, Lynch stepped ceremoniously up to a small wooden platform in front of the manger. He faced the crowd, took up a microphone in one hand, apologized for being "a little bit emotional" and indicated that this time, the ACLU was going a bit far.

"What's next?" he said. "Are we going to take 'In God We Trust' off the coin?"

The crowd seemed sympathetic and Lynch warmed up pretty quickly.

He talked about Pawtucket tradition, childhood visits to the Nativity display when it was in Slater Park (the crowd clapped), and Christmas good will that transcends religious differences ("Isn't that what these statues really mean to everybody?")

Then he glanced offstage, to where a bearded Santa Claus in a red corduroy suit, imported for the occasion, stood waiting in the wings. Santa hopped on stage and Lynch put his right arm around him, drinking-buddy style.

"Let's sing a few Christmas carols," Lynch suggested to the crowd. "Nobody does what we do, baby."

After "We Wish You a Merry Christmas," Lynch suggested the group do "another one that apparently bothers people." The crowd launched into "Silent Night" and, then, "It Came Upon a Midnight Clear."

Lynch stepped off into the singing crowd with his microphone and wandered over to 11 students from the Baldwin elementary school, who stood to one side with their teacher, Mary Lou Catelli. He moved the microphone from student to student and then trained it on the teacher.

Songs finished, Lynch returned to the podium.

"Hey," he said to the smiling crowd when it settled down, "was that good?"

That was good.

"Hey," he said to nobody in particular, "you're great."

"You too, Dennis," somebody shouted out.

"I love ya, baby," Lynch responded.

"We're with you," someone else said.

* * *

LYNCH SAID afterward that he did not know when the lawsuit would be heard. The suit asks the court to issue an immediate temporary restraining order forcing Pawtucket officials to remove the display, which is owned by the city but is not on city land (It is in a park owned by Old Slater Mill). Named as defendants, besides Lynch and the city itself, were Finance Director Mumford and Parks and Recreation Director Guy Dufault.

Steve Brown, executive director of the ACLU's Rhode Island affiliate, said yesterday that he wished Mayor Lynch "would take his responsibilities under the Constitution a little more seriously." He also said, "I am sorry that the mayor doesn't recognize the constitutional obligations he is under to uphold the First Amendment. The principle of separation of church and state is a very important one and a Nativity scene display sponsored and paid for by the city can be extremely offensive to members of other faiths. The mayor and other city officials simply have no business getting involved in religious activities."

Said Lynch, to yesterday's riverbank crowd: "Every Christmas needs a Scrooge and the ACLU is the Scrooge this year."

And in this corner,

LYNCH

niddle. . .

for the city of Pawtucket, Mayor Edward

Good News: Mayor Lynch, what was your reactions to the ACLU not wanting the nativity scene to be exhibited?

Mayor Lynch: I had two reactions to it. The first time was the first year I was elected. Each year that I've been here, someone has stepped in successfully representing the ACLU and telling me that the nativity scene in the office and outside display should be removed. I have normally refused each year. I told them this is a great, free society, and everyone has the right to sue and apparently you're going to have to take that direction, because I refuse to take it down. I went through that every year, and we've stood about it every year, this year they didn't come back however, they decided to sue. So, it didn't just happen this year. This also points out the long tradition of having a display of this type in this community.

Good News: They didn't want you to have the nativity scene in your office?

Mayor Lynch: Yes, that was told to me repeatedly, and I don't understand why that wasn't brought up this year. My first reaction quite honestly, when I heard about the suit, was great business, with all the important things we have to deal with and do we have to argue over a long standing tradition in a community, that no one has found offensive. But, quite to the contrary, has found it a spirit-lifting and a moral booster. The Christmas season is a very sad time for some people, and its a great time to help one another. This was our thought behind the nativity scene. I can trace this thing forty years-

Good News: It's been here an years ?!

Mayor Lynch: Oh yes, remember at years ago my parents taking me to Slater Park, where it was located until I became Mayor, and incidently 2/10 of 1% of our total area of Christmas display is devoted to the manger scene. Less than 1%, thats all the manger scene takes up, so that is not out sole purpose to have a nativity scene, I think there is some misunderstanding on the part of some people from the stories you would think the city of Pawtucket has a large nativity scene in the steps of city hall and that's it. We also have the carousel in Slater Park, Santa Clause is there, kids get a free ride, Christmas music playing and the children get little bags of candy. We play music here at the City Hall and the new mall downtown.

Good News: Did you get any complaints about the manger scene before the ACLU approached you?

Mayor Lynch: No. The only thing you that has been clearly demonstrated is the support and the good feeling that it has generated over the years, for instance, the Jewish community in Pawtucket was one of the first to rally to my defense and support. They do not consider it a religious service but, a matter of good will and good tradition. They publicly said this.

Good News: It appears that the good ole seeing demonstrations, is being violated.

Mayor Lynch: I think that is the nub of the question. How you think about this tradition, let us consider a couple of things. First, we are in a new year and we have consciously elected to mark our time through a calendar that dates from the birth of a man called Christ. That is how we mark our time. I do not find that offensive at all. Original.., that was a holy day, it has become a holiday celebrated by all people. I don't find that offending. I think what has happened is the undermining of the rights of all to freedom of expression. Do the people, of people have any rights? I think they do.

Good News: You said before that you were receiving quite a bit of support, have the local churches had any comments?

Mayor Lynch: Yes, a number of them state wide. This issue was blown up by the wire services and we got communications now from all over the country, from people who have read about this. I think the reason for this is that people recognize that this case could will be a precedent-setting one. No case has reached the supreme court of its own merits, this case apparently is one of those that could easily do that. Judge Pettine has been very critical though. I have no confidence in what Judge Pettine will do with this case, and no reason for saying that is the very way he has handled this. He put it off until January 21. He could have decided this before Christmas, I think that was a mistake to put it off, he'll probably put it off over longer than that to get back from Christmas season, which has put me at a loss to take to the ACLU, and get over the issue, or file a brief that or that his statement was over. It was released to the press without any contact to the city attorney. The suit brought against the city of Pawtucket said that it was taxpayers money, used for religious purposes or city owned land and we don't own our the land so, the suit was defective in that respect. Judge Pettine should have recognized that, we are or private property, owned by the Slater Mill Association, why is desecration and a waste of good city, has allowed us or their land to put up this display for all the people. So, we are not on city owned property, it is a very interesting point that we still try to have again in court.

Good News: Who owns the manger scene?

Mayor Lynch: We do, the taxpayers of the city of Pawtucket. This current manger scene is about 9 years old and in need of re-hamerization, and we are going to have an even a better looking one next year. We want to refurbish and expand our overall display because it's become so popular. People come from many communities to Pawtucket to see it.

Good News: If it came down to the point where it was determined that the city wasn't allowed to own it, would you still consider building structures to display a nativity scene?

Mayor Lynch: Its unbelievable, the reaction we have had from churches, businesses, and private individuals in the community that said they have a piece of land, we'll put it here or there. That is not the point. The point is that we believe in the tradition of historical fact, and reason has challenged we yet an another Christ was born that years ago. That is a matter of historical fact. That is the celebration that has resulted almost 2,000 years later in many communities.It is important for us to not back away from that, and talk about the fact that we will not censor historical facts. I find it rather amazing, if not amazing, that the ACLU could take a position where they are against censorship and decisively without exaggerating, they are seeking us to take a manger scene out, they are asking us to remove the person from his own birthday party, and change historical fact- that is censorship.

Good News: So, you are saying that the manger scene can also be reconsidering what is historically authentic?

Mayor Lynch: We historically authentic, fact, they haven't disputed the fact- that it is historically?

Good News: What is religious correlation or association with the scene, how do you respond idea that the manger scene viewed as a religious and the fact that the public in general, of different denominations different religions as in as part of the city are displaying it.

Mayor Lynch: Well, I have given part of the that right in your ear and that is the comment I have had come about years. Pawtucket Christmas without result in anything there building religious there not Judge Pettine I will be to tell the truth,we are nothing out the the SCE. After value of portals of the church SCE'S have disagreed Pettine and the entertainment probably have to be city claim earned to the We matter are are coming from or background religion, otherwise, it would be a that couldn't do so, of that display and not There is nobody forcing believe anything in our it's similar to Join a Protestant and sisters community or what are Jewish time of the expression of peace will

Good News: I interviewed ACLU recently and it as as far as the city a use of a manger scene, to be on public grove it is not, they would with the idea of saying is expression interfaith sentiment calling it appear as being you can't with another years other words you can along with Jewish but, use a display as where a display doesn't cause a display will expressing something.

Mayor Lynch: That is just as this suit is in fact, they are another religion by you are not allowed that I mean by the the constitution, where in do they ever say, on printed word, that we shall not have a wall that you shall not have of freedom of expression is all we are talking the community, where Bailey what that to be have been comfortable this freedom of and other people resent never seen Jewish as are over this issue, absolutely resent some to impose another religion on them and what the christian Some are even critics trying to foster a re we are not. That thing that the and their actions leads to

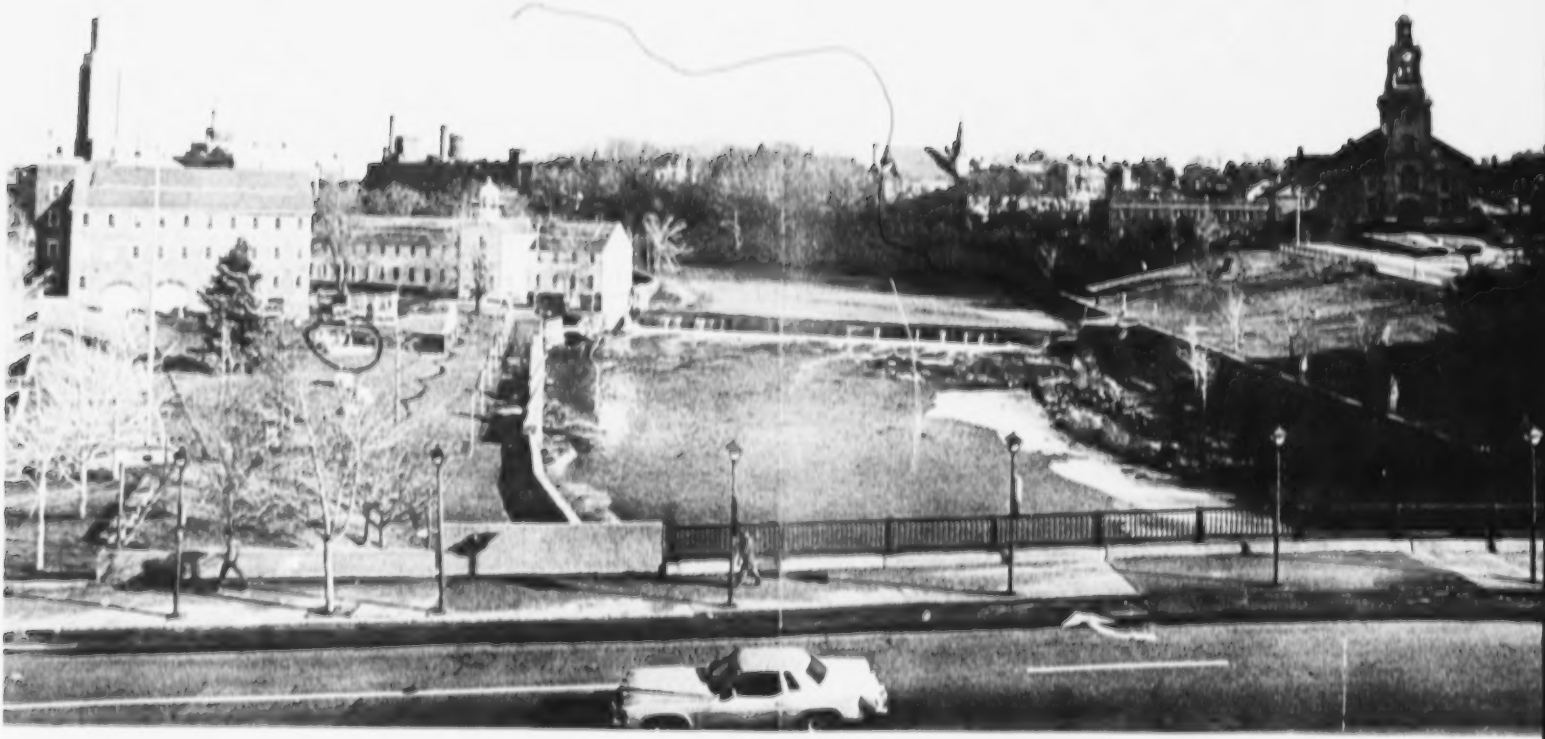
Good News: They, their actions as in presumption of the faith, secular humanis

Mayor Lynch: Right should not be Point people. We have to

DEFENDANT'S EXHIBIT B

DEFENDANT'S EXHIBIT C-1

DEFENDANT'S EXHIBIT C-2



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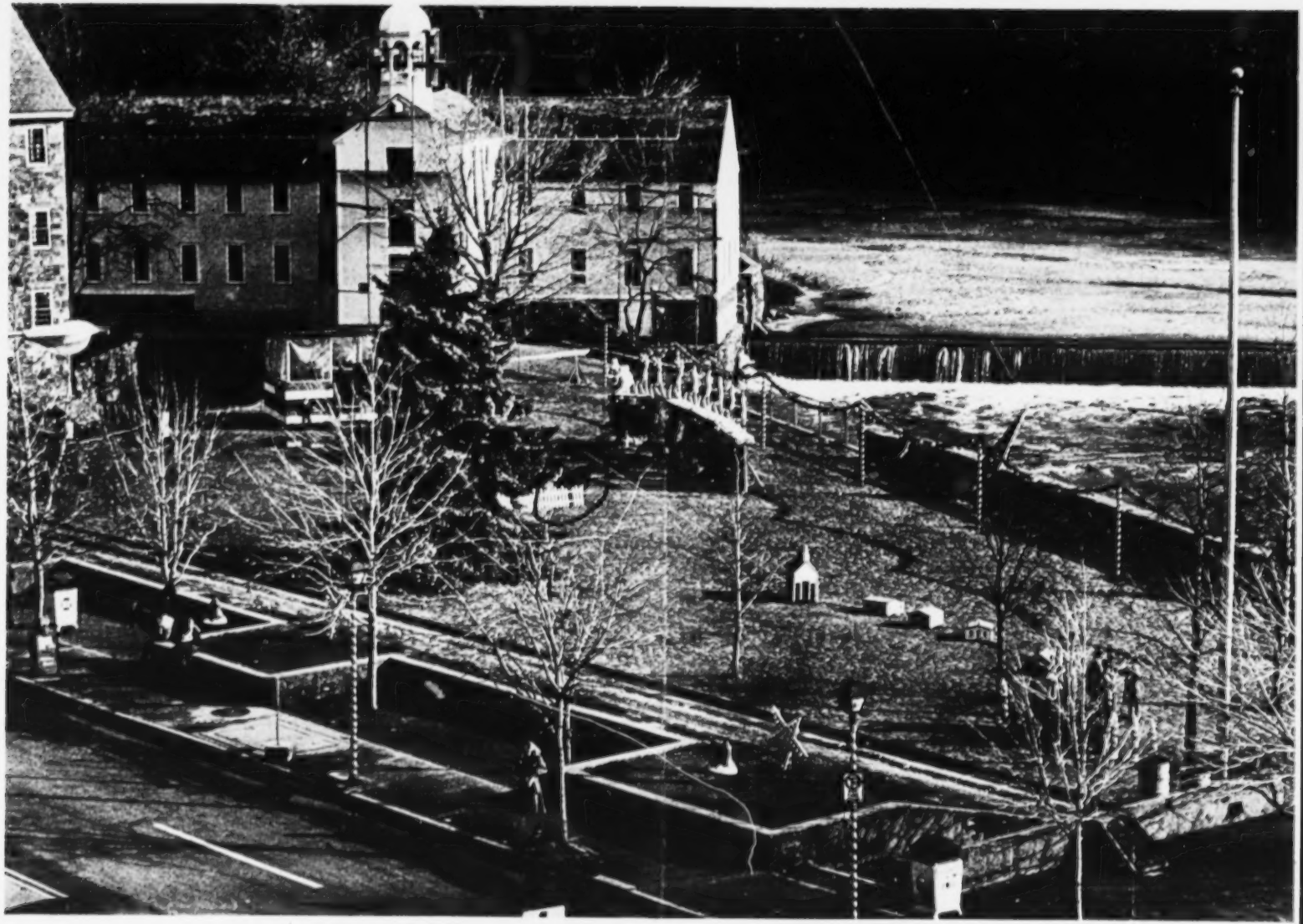
DEFENDANT'S EXHIBIT C-4



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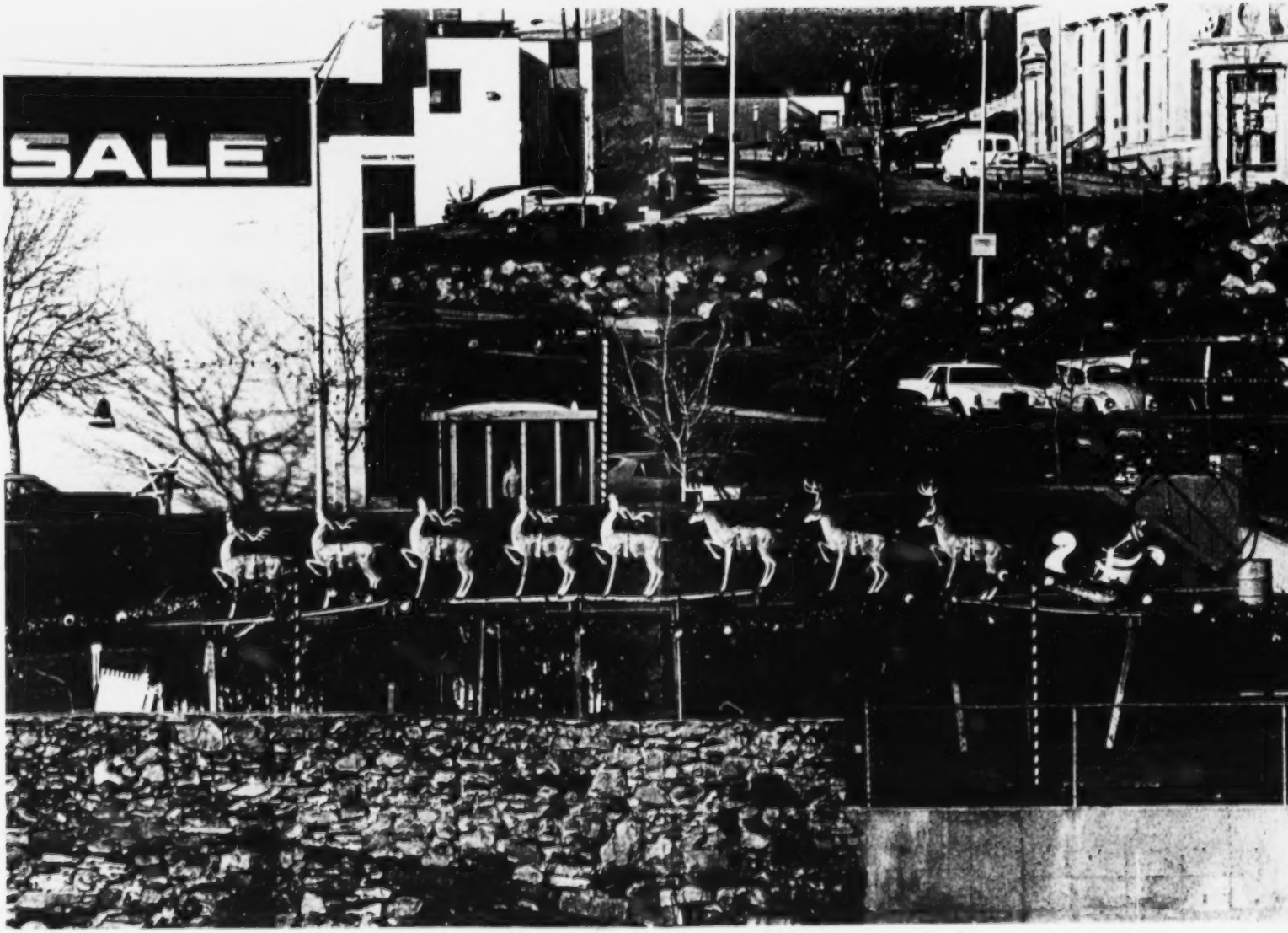

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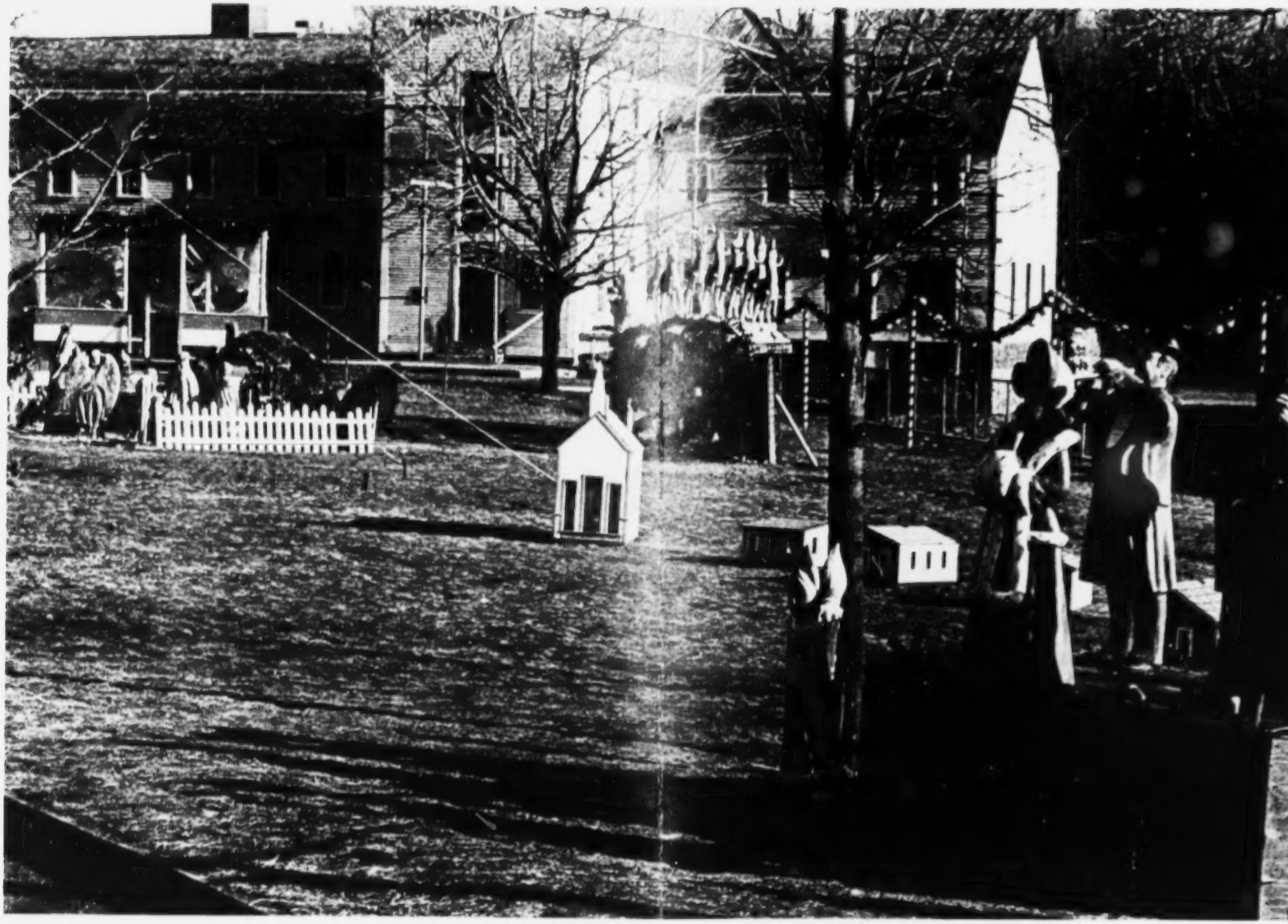

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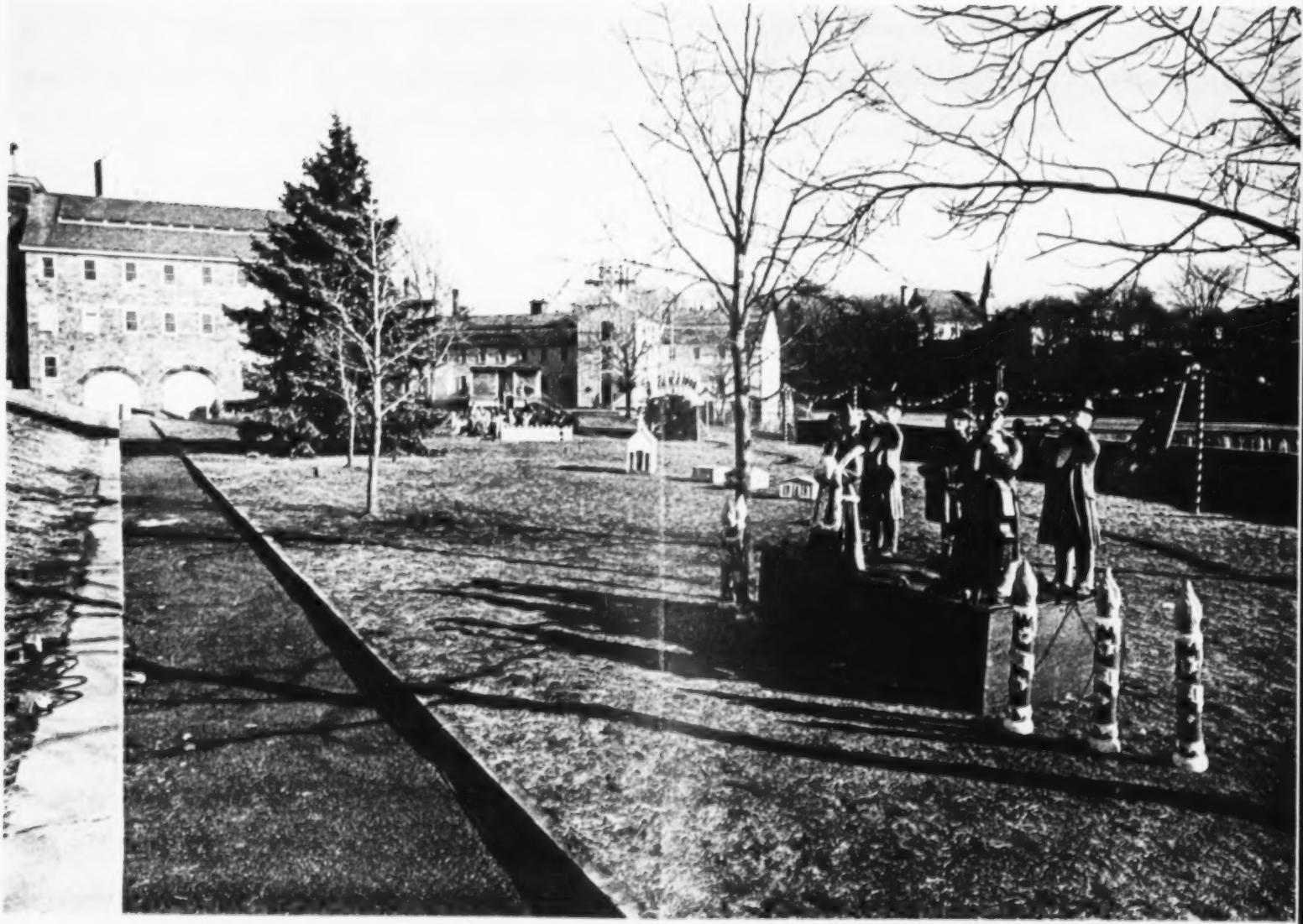

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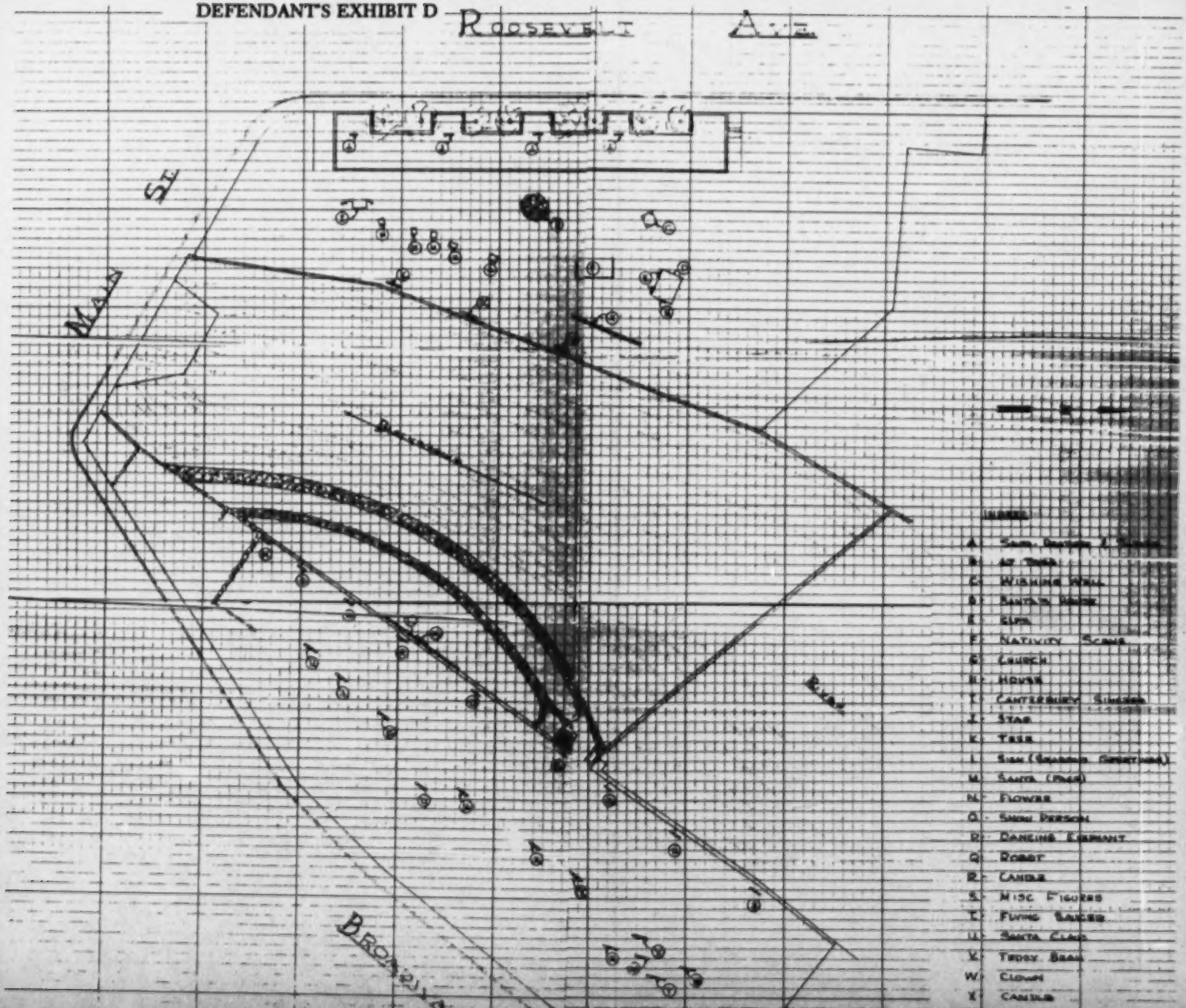

82-1256

Office-Supreme Court, U.S.
FILED
MAR 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-

In The

Supreme Court of the United States

October Term, 1983

DENNIS LYNCH, Individually And As Mayor Of The City of Pawtucket, RICHARD A. MUMFORD, Individually And As Finance Director For The City of Pawtucket, And GUY DUFAULT, Individually And As Director Of Department Of Parks And Recreation Of The City Of Pawtucket, And The CITY OF PAWTUCKET,

Petitioners,

v.

DANIEL DONNELLY, GEORGE DRIEBEL, ROBERT GOODWIN, GREG FRAZIER And AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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*Amato A. DeLuca
Sandra A. Blanding
REVENS & DeLUCA LTD.
946 Centerville Road
Warwick, Rhode Island 02886

Attorneys for Respondents

*Counsel of Record

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

DENNIS LYNCH, Individually And As Mayor Of The City Of Pawtucket, RICHARD A. MUMFORD, Individually And As Finance Director For The City Of Pawtucket, And GUY DUFAULT, Individually And As Director Of Department of Parks And Recreation Of The City of Pawtucket, And The CITY OF PAWTUCKET,

Petitioners,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER And AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

QUESTION PRESENTED

Does a municipality's ownership, erection, and display of a nativity scene depicting the Biblical story of the birth of Jesus Christ violate the Establishment Clause of the First Amend-

ment to the United States Constitution, made applicable to the States by the Fourteenth Amendment?

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STATEMENT OF THE CASE

The City of Pawtucket, Rhode Island, together with several governmental officials, seek here a review of the decision of the United States Court of Appeals for the First Circuit, which held that the City of Pawtucket, by its ownership and erection of a Nativity Scene depicting the Biblical account of the birth of Jesus Christ, has violated the First and Fourteenth Amendments of the United States Constitution.

F.2d (1st Cir., 1982). The Court upheld the decision of the United States District Court for the District of Rhode Island, in its findings that the creche maintains a fundamental religious significance, that the municipal defendants, petitioners here, were unable to advance any legitimate secular purpose for the inclusion of the creche in its Christmas display, and that the City's erection of the creche has primary effect of advancing religion.

The City of Pawtucket has annually erected a Christmas display in an urban park area owned by a private historical association and located in downtown Pawtucket, approximately three hundred feet from the Pawtucket City Hall. The City purchased the life-sized creche in 1973, and erects it in the center of the westerly portion of the park, where it is directly across and clearly visible from the adjacent streets and the bus stop located thereon. Twelve spotlights and numerous smaller lights, financed by the City, illuminate the entire display; two of those spotlights are trained directly upon the Nativity Scene.

In 1980, in addition to the annual lighting ceremony, the Mayor of the City, a petitioner here, held a press conference next to the creche. During that press conference he led public school children in caroling, and he vowed to fight the ACLU's attempt to "take Christ out of Christmas." Indeed, the testimony of plaintiffs and their experts in religious and in symbolism, as well as the public's response to the Mayor's support of the creche, demonstrate that many identify the City's position as one of support for the Christian tradition and the religious beliefs of the majority of the community.

The Mayor, on the other hand, testified that the creche was an incidental part of the Christmas display, and that the purpose of the display would continue to be met even if the Nativity Scene were removed. Two local businessmen who testified for the City agreed.

The United States District Court concluded from the evidence before it that the creche continues to represent a religious statement, and that the City's ownership, erection, and display of the creche violates each aspect of the tripartite test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971). In its review of the trial court's decision, the United States Court of Appeals for the First Circuit applied a test of strict scrutiny of governmental action which is preferential in the treatment of one religion over another. Larson v. Valente, ____ U.S. ____, 102 S.Ct. 1673 (1982). Although the Court's approach reflected the intervening decision in Larson, supra, it also specifically upheld the trial court's determination that the

creche is indeed a religious symbol, and that the City's actions violated both the secular purpose test and the primary effect test set forth in Lemon, supra.

ARGUMENT

Petitioners, the City of Pawtucket and its officials, couch the questions which they present so as to seek review of the constitutionality of an entire Christmas display, as opposed to the municipal ownership and erection of a Nativity Scene. Further, they seek a determination of the constitutionality of including any religious symbolism within all publicly sponsored Christmas displays. Petitioners' questions as presented both misconstrue and far exceed the scope of the decision of the United States Court of Appeals for the First Circuit, from which review is sought. Respondents respectfully suggest that the proper characterization and scope of the review sought before this Honorable Court is merely this:

> Did the lower courts correctly determine that a municipality's ownership, erection and display of a Nativity Scene depicting the the Biblical story of the birth of Jesus Christ violates the Establishment Clause of the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment?

Respondents urge that the United States Court of Appeals' decision in this matter is not in conflict with any reported decisions of other United States Courts of Appeals, and is in complete accord with the relevant decisions of the United States Supreme Court.

No new legal issue is presented here; rather, the United States Court of Appeals has properly applied existing case law to the particular factual situation before it. Finally, if the United States Court of Appeals' decision conflicts in any way with previous decisions of other state courts of last resort, then a consideration of the age of the state court decisions upon which petitioners rely, and a reading of those decisions in light of subsequent decisions of the United States Supreme Court and other United States Courts of Appeals, amply demonstrate that the decision of the lower court in this case more accurately reflects current case law pertaining to the Establishment Clause of the United States Constitution.

The municipal petitioners argue first that the manner in which the City presented the Nativity Scene is neutral by its nature, having no purpose or effect beyond that of the entire Christmas display. Petition for Certiorari, at 8. They maintain that the courts below should properly have applied the tripartite test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971), to the City's entire Christmas display, rather than to the creche alone. Petition for Certirari, at 12. By so arguing, Petitioners ignore the findings of fact made by the trial court and upheld by the United States Court of Appeals, and seek instead to bury the religious nature of the creche behind the facade of secular Christmas symbols. Furthermore, it is simply not true, as petitioners suggest, that "on the record in this case the creche has no purpose or effect at all apart from its surroundings." Id. at 8. Substantial testimony presented to the District Court

demonstrates that even in the setting of Hodgson Park, surrounded by secular Christmas symbols, the creche retains its religious significance. Contrary to petitioners' assertions, the findings of the United States Court of Appeals for the District of Columbia in the case of Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973) is in accord:

> The Pageant...is not subsumed in a religious mission, but it cannot be ignored that the religious symbol [the creche] contained in the Pageant can have a religious effect, and the degree of this effect can vary according to how it is utilized. In turn, the effect of the Government involvement therewith can vary according to the restrictions and controls placed thereon. A balancing of all these factors determine if the effect of the Government involvement is more than remotely or incidentally beneficial to religious institution.
>
> The creche as used in the Pageant is not supposed to have a sectarian effect in the sense of advancing any religious belief. The reality of the situation - considering its status as a Christian religious symbol - leaves open for debate whether its use is susceptible to misinterpretation, and the Government involvement looked upon as an imprimatur of the belief that it symbolizes.

Id. at 72-73, n. 13.

In addition , it should be noted that the factual circumstances in Allen, supra, differed from those present in this case. The City of Pawtucket is not here participating in a private event which includes among many displays a Nativity Scene. Rather, the City is erecting the creche within its own municipal display.

Applying the traditional tests set forth in Lemon, supra, both the District Court and the United States Court of Appeals found that the City's purpose in erecting the creche was "to endorse and promulgate religious beliefs," and that the erection of the creche "had the primary effect of advancing religion." Petition for Certiorari, at 8-12. The record reflects that the creche contributed nothing to the commercial purposes of the display, nor did the City disclaim any endorsement of the religious message nor include in the display any of the customs or traditions of other religions. Id. at A-8. Ample evidence also demonstrates that the actions of the City and its agents created an "aura of governmental approval" which had the effect of advancing the Christian religion. Id. at A-69. It cannot be disputed that such non-monetary support can constitute a substantial advancement of religion. Stone v. Graham, 449 U.S. 39 (1980); Grendel's Den, Inc. v. Goodwin, 662 F.2d 102 (1st Cir. 1981).

The City's reliance on Florey v. Sioux Falls School District, 619 F.2d 1311 (8th Cir.), cert. den. 449 U.S. 987 (1980), is not well founded, where the Court's conclusions in that case rested on clearly distinguishable factual circumstances. In Florey, the Court clearly stated that

its decision pertained only to the facial validity of rules regulating the observance of holidays in the schools. It did not purport to encompass the implementation of those rules. Id. at 1313. Since the evidence established that the purpose of the rules was to "insure that no religious exercise was a part of officially sanctioned school activities," the Court found that the rules had a valid secular purpose. Id. at 1314. Petitioners' reliance upon O'Hair v. Clements, 638 F.2d 1231 (1981), cert. den. 454 U.S. 878 (1981) is likewise unpersuasive, for as an unpublished opinion it has little precedential value.

Petitioners' argument that the United States Court of Appeals' decision in this case is in conflict with the decisions of other state courts of last resort is also illusory. The Supreme Court of Oklahoma's decision in Meyer v. Oklahoma City, 496 P.2d 789 (Oklahoma, 1972), cert. den. 409 U.S. 980 (1972) relies solely upon the Oklahoma Constitution which differs substantially from the Establishment Clause of the First Amendment of the United States Constitution. The Supreme Court of Oregon's decision in Eugene Sand and Gravel, Inc. v. City of Eugene, 558 P.2d 338 (Oregon, 1976), cert. den. 434 U.S. 876 (1977) also differs factually from the instant case in that that court had previously held the City of Eugene had violated the United States Constitution by authorizing the erection by private parties of a cross on public property. Lowe v. City of Eugene, 451 P.2d 117, 459 P.2d 222, 463 P.2d 360 (1969), cert. den. 397 U.S. 1042 (1970). In response to the court's decision in that case, the sponsorship, purpose and cere-

monies surrounding the cross were altered, and a plaque stating the cross's dedication as a Veterans' war memorial was erected. Finally, the decision in Paul v. Dade County, 202 So.2d 833, cert. den. 207 So.2d 690 (Fla. 1967), cert. den. 390 U.S. 1041 (1968), is not a decision rendered by a state court of last resort.

Petitioners also assert that review by certiorari should be granted in order to clarify this Court's decision in Larson v. Valente, U.S. , 102 S. Ct. 1673 (1982). Review for this reason is unwarranted, for the United States Court of Appeals specifically held that the City's actions in this case violated both the purpose and effect tests set forth in Lemon, supra; therefore, even if the Court of Appeals' reliance on Larson was misplaced, its decision would remain, unless this Court also disagreed with its application and interpretation of Lemon v. Kurtzman.

Finally, to the extent that Anderson v. Salt Lake City Corporation, 475 F.2d 29 (10th Cir. 1973) is in conflict with the lower court's decisions in this case, respondents respectfully suggest that the precedential value of Anderson has been severely restricted by this Court's recent decision in Stone v. Graham, supra.

CONCLUSION

For the reasons set forth herein, respondents respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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No. 82-1256

In the Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS LYNCH, INDIVIDUALLY AND AS MAYOR OF THE CITY OF PAWTUCKET, RICHARD A. MUMFORD, INDIVIDUALLY AND AS FINANCE DIRECTOR FOR THE CITY OF PAWTUCKET, AND GUY DUFAULT, INDIVIDUALLY AND AS DIRECTOR OF DEPARTMENT OF PARKS AND RECREATION OF THE CITY OF PAWTUCKET, AND THE CITY OF PAWTUCKET,

PETITIONERS,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER And AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE PETITIONERS

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I

QUESTION PRESENTED

Does Municipal Sponsorship of a Traditional and Dominantly Secular Christmas Celebration Which Includes a Creche Violate the Establishment Clause?

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BRIEF OF THE PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 621 F.2d 1029, and appears at pp. A-1 to A-20 in the Petition for a Writ of Certiorari. The opinion of the United States District Court for the District of Rhode Island is reported at 525 F.Supp. 1150 and appears at pp. A-21 to A-74 in the Petition for a Writ of Certiorari.

Jurisdiction

The decision of the United States Court of Appeals for the First Circuit was rendered on November 3, 1982, its mandate issued on November 24, 1982. The Petition for a Writ of Certiorari was filed on January 26, 1983, and the Writ was issued on April 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Constitutional Provisions Involved

1. First Amendment to the Constitution of the United States.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

2. Fourteenth Amendment to the Constitution of the United States.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

For over forty years, the City of Pawtucket, Rhode Island, has celebrated the Christmas holiday with traditional displays, decorations, and music. (J.A. 105) The principal com-

ponents of the observance are situated in four locations throughout the City. (J.A. 52, 53) One of the displays is in Hodgson Park, privately owned property, in the heart of the retail commercial district. (J.A. 45, 107, 108) That park, situated on the east and west banks of the Blackstone River, is bounded in part by the City's two major retail stores. (J.A. 107, 108) A second part of the celebration takes place at the municipal ice rink, which is decorated for Christmas (J.A. 53), and where the City sponsors a Christmas party for mentally retarded children. (J.A. 53) In the City's Slater Park, a carousel is decorated with Christmas lights and occupied by a live Santa Claus. (J.A. 53) Near the original Samuel Slater Mill and the Mill Museum, the City Hall is lighted and decorated, and Christmas music is played through a sound system. (J.A. 53)

The observance of Christmas is only part of the City's annual sponsorship of national holidays. During the year, the City expends money to conduct or assist ceremonies on Memorial Day and Veteran's Day and to present parades and fireworks displays on the Fourth of July. (J.A. 54, 110, 111) The immediate area surrounding Hodgson Park has for years been the subject of an intensive redevelopment effort which has aesthetic, commercial, and cultural objectives. (J.A. 109, 110) The downtown mall near Hodgson Park is used at various times throughout the year for traditional celebrations as part of the commercial promotion of the area. (J.A. 110, 111) The Christmas celebration—especially the lighted display at Hodgson Park—is sponsored by the City in cooperation with the downtown retail merchants association, which regards the Christmas display as part of the commercial promotion of the downtown business district. (J.A. 107)

Hodgson Park is owned by a private non-profit organization which operates and maintains the nearby Slater Mill Museum, a national historic site. (J.A. 108, 109) The City's use of the museum property during the Christmas season is by informal oral arrangement with the organization. (J.A. 35) This Park

property comprises approximately 40,000 square feet, divided by the Blackstone River, with 21,000 square feet on the west bank and 19,000 square feet on the east bank of the River. (J.A. 90) The City-owned Christmas display at Hodgson Park distributes along both banks of the River much of the traditional symbolism of the season with approximately 2,500 colored lights and 12 spotlights. (J.A. 40) There are a 40-foot high lighted spruce tree, other real and artifical Christmas trees, figurines, wooden representations of stars and trees, cartoon characters, snowmen, a wishing well, a Santa Claus sleigh pulled by reindeer, a miniature New England village, a grouping of caroling figurines, artifical candles, candy canes, striped poles and a podium used by a live Santa Claus. (J.A. 51, 52) The east bank River wall proclaims "SEASONS GREETINGS" in lettering 48-feet long and 4-feet high. (J.A. 47)

The west bank portion of the Hodgson Park display includes a nativity scene or creche which covers approximately 140 square feet out of the total 40,000 square feet. (J.A. 45) There is a manger and figurines, which range in height from 5 inches to 5 feet (J.A. 52): the infant, parents, shepherds, kings and animals. (J.A. 52) This nativity scene is surrounded by the 40-foot spruce tree, the 7 foot high and 5 and ½ foot wide wishing well, Santa Claus and reindeer, 15 feet high and 25 feet long, and the Santa Claus house, 14 feet high and long and 11 feet wide. (J.A. 51) Away from the immediate area of the nativity scene other structures and figurines are as large or larger than the nativity figures. (J.A. 51) The visual effect of the nativity scene would depend entirely upon the vantage point of the visitor. (J.A. 49) In the immediate vicinity, it would be clearly visible, but at many locations it would be barely discernible or not visible at all. (J.A. 64; Def. Ex. B, C-2, C-3, J.A. 46, 170-177, R. Vol. I, 21, 22) The monetary value of this creche is less than 5% of the monetary value of the entire Hodgson Park display. (J.A. 45) The total display is valued at approximately $5,000, of which the value of the creche is approximately $200. (J.A. 45) Since its purchase in

1973 for $1,365, there has been no maintenance or improvement. (J.A. 33-34) The erection and dismantling of the displays requires about 600 service hours by City employees, of which time 2 hours are spent on the nativity scene. (J.A. 30-31) The annual cost of erection and dismantling approximates $4,500, of which $20 is attributable to erecting and dismantling the creche. (J.A. 42)

None of the Christmas activities at Hodgson Park or at the other three locations has any religious character, nor is in any way connected with the nativity scene. (J.A. 53) In addition to the Christmas party for the mentally retarded at the ice rink, there are free carousel rides at Slater Park presided over by a live Santa Claus who distributes candy. (J.A. 53) At City Hall, which also contains interior Christmas decorations, there is caroling and a Christmas party. (J.A. 53) The Hodgson Park display is opened for the season by a ceremony during which the Mayor turns on the 2500 lights and 12 spotlights and a Santa Calus arrives on a fire truck. (J.A. 40, 52)

This traditional public celebration of Christmas never occasioned comment or controversy before the filing of this legal action. (J.A. 99, 105) The celebration had taken place annually for over 40 years without complaint or discord. (J.A. 105) The complaint in this case was filed on December 17, 1980, and a temporary restraining order requested for Christmas week. At that point, for the first time in the history of the City's Christmas celebration, substantial public controversy arose. (J.A. 99) The public controversy was directed at this lawsuit. (J.A. 99) Many of the public complaints expressed the view that the challenge to the Christmas display was trivial. (J.A. 100) The specific viewpoints expressed were varied as to why that tradition should continue. (J.A. 96) Many of the public expressions came from outside the community and outside the State of Rhode Island. (J.A. 94) Much of the public opinion was "... a questioning why anybody would enter into a challenging of what has been a very joyous occasion for all people." (J.A. 95)

The District Court enjoined the City from continuing to include the creche in its celebration. The tri-partite test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) was applied by focusing upon the creche abstracted from the Hodgson Park display and from the celebration as a whole and from the annual practice of holiday observances. It was held that the nativity scene, so isolated from its context, was an unsecularized religious symbol which had the purpose and primary effect of advancing religion rather than expressing the Christmas holiday. Notwithstanding the host of secular symbols surrounding the creche and the City's position that in applying the tri-partite test the appropriate focus is not on the religious element but on the activity of which it is a part, the District Court said that "In the Court's view, this overstates the role that the context in which the religious component appears plays...". (Cert. Pet. A-51). Although the Court expressly recognized the "passive nature" of the display of the creche, it concluded that "using a religious symbol in a seasonal celebration of a holiday...has singled out...religious beliefs as worthy of particular attention...". (Cert. Pet. A-66, A-69) On the basis of the evidence relating to public controversy which arose out of the commencement of this legal action, it was also held that "excessive entanglements" existed.

The Court of Appeals for the First Circuit, by divided vote, affirmed the issuance of the injunction against maintenance of the creche. The majority opinion adopted the lower Court's analytical isolation of the creche from the City's entire Christmas celebration and from the rest of the Hodgson Park display. Agreeing with the characterization of the creche as an exclusively religious symbol, the majority concluded that its purpose and primary effect were the advancement of religion. However, the Court of Appeals' majority, noting the lower Court finding that "administrative entanglement between government and religious organizations had not occurred"

with reference to the evidence that this legal action had produced public controversy which had never before existed in the 40-year maintenance of the Christmas display with its nativity scene, stated that it was "unwilling to place much weight on the Court's determination that the City's actions risked political divisiveness along religious lines." (Cert. Pet. A-12)

Additional to the application of the tri-partite test, the majority opinion in the Court of Appeals also held that the sponsorship of the creche was a discriminatory religious preference which made it suspect and invalid under the "strict scrutiny" analysis, relying for its conclusion upon *Larson* v. *Valente*, U.S. , 102 S.Ct. 1673 (1982).

The dissenting opinion in the Court of Appeals disagreed that the creche in a traditional Christmas setting was a dominantly religious symbol. The dissent emphasized the City's employment in its celebration of all the conventional symbolism of the Christmas season and concluded that in context the passive display of the nativity scene is "prototypically symbolic of Christmas" and that the figures in the creche "simply contributed to the message that the holiday they represented was at hand." (Cert. Pet. A-17)

From this decision of the Court of Appeals this Court has granted the City's petition for certiorari.

Summary of Argument

Establishment Clause principles define the degree to which government contact with religion is permissible. The removal of all religiosity from government activity is neither practical nor desirable because the religious tradition of the American people is too deeply ingrained in the life of the nation. Government is prohibited from promoting religion. But passive acknowledgment of the religious tradition is not promotion of religion. Religious origins in American culture do not prohibit public observance of contemporary secular events which de-

rive from those religious origins. *McGowan* v. *Maryland*, 366 U.S. 420 (1960). Where the secular aspects of an activity dominate the religious aspects, a government may engage in such activity without offending the Establishment Clause. The underlying constitutional standard is whether government is conducting a secular activity or a religious exercise.

Government celebration of Christmas is a secular activity. The American Christmas is a national folk festival which derives from the Christian celebration of the nativity. Although the nativity theme has not disappeared from the contemporary observance, it has been heavily overshadowed by the secular components of the national festival. Most of the modern secularity in Christmas is traceable, one way or another, to religious roots. But the contemporary festival is a vast conglomeration of folk customs and symbols, feasting and fraternizing, music, literature and art. The religious origins in the holiday have evolved into a secular humanism and the nativity scene has evolved into a major element of the artistic component of the national festival.

The City's Christmas observance in this case is completely typical of the American folk festival. It is heavily secular in tone and content. The creche is one symbol among Santas and reindeer, Old English figurines, snowmen, cartoon character cut-outs, trees, lights, bells, candles and stars. There are Christmas carols, parties, free candy and carousel rides. The entire observance is a melange of the familiar trappings of the American Christmas season.

Under the decisions of this Court the tri-partite test must be applied to the entire governmental activity and not merely to a single religious element in that activity. The issue in this case is whether the City's celebration of Christmas is a dominantly religious or a dominantly secular activity. Each component of government activity is merely a part of the whole and if the tri-partite test is not applied to the entire activity, the constitu-

tional principles will become distorted. In this case, the City is no more sponsoring a creche than it is sponsoring a snowman, a Christmas tree, a Santa Claus, or a wishing well: it is sponsoring all of these and much more as part of an integrated celebration of a legitimate national holiday. If the sponsorship of the creche were to be invalid under the *Lemon* tri-partite test, it could only be because the creche makes the entire celebration a religious activity. The creche is part of the City's celebration because the nativity theme is part of the modern secular American Christmas.

The sponsorship of the creche is not—contrary to the conclusion of the Court of Appeals—a religiously discriminatory action. *Larson* v. *Valente, supra,* does not apply herein because the decision in that case was premised upon the existence of facial discrimination. Where, as in this case, the character of the government activity is in dispute, it is the *Lemon* tri-partite test which must measure the activity against Establishment Clause values. This was implicitly conceded by the Court of Appeals in its use of the *Lemon* test to apply its strict scrutiny analysis purportedly following *Larson* v. *Valente, supra.*

The City's Christmas celebration does not violate the *Lemon* test. The government action has a secular purpose of joining with the community in celebrating the national legal holiday of Christmas. The passive inclusion of those symbols, both secular and sectarian, which are traditionally associated with the American folk festival of Christmas does not result in the advancement or inhibition of religion. Since the government activity is secular and since it does not conduct that activity in affiliation with any outside religious group, its Christmas celebration does not involve entanglement with religion.

Argument

I. The City's Passive Display of a Creche as Part of a Dominantly Secular Christmas Celebration Does Not Constitute an Establishment of Religion.

This Court has consistently declared that religion—by history and tradition—is too far woven into the fabric of American culture to expect or permit the Establishment Clause to isolate completely government from religion. Some contact between the two is inevitable, and it is the nature and extent of that contact which implicates First Amendment principles. The identification of religiosity in public activities only begins the constitutional inquiry rather than ending it. Much of the secular content in contemporary American institutions and traditions derives from roots which were wholly or partly religious. Government contact with those institutions and traditions could be religiously sterile only if government aggressively rooted out from its activities all incidents of religious origin, and this Court has often held that such is not required by the Establishment Clause. Neutrality toward religion and not hostility is the governing constitutional value. Secular and not religious activities are the business of government.

A. *Establishment Clause Principles Do Not Prohibit a Public Observance of Christmas Which Includes Acknowledgment of the Nativity Theme in the Holiday Tradition.*

In *McGowan* v. *Maryland*, *supra*, this Court sustained the constitutionality of Sunday closing laws. The laws unquestionably gave some benefit to religion[1] and, just as unquestionably, had their origin in dominantly religious tradi-

[1] One undeniable result of Sunday closing laws is "...to render it somewhat more likely that citizens would respect religious institutions and even attend religious services...." *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 776 (1973).

tion. But since their contemporary content was mainly secular, their religious origin and religious benefits did not amount to an establishment of religion. In upholding those laws, this Court, at 333 U.S. 445, stated:

> "To say that the States cannot proscribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State."

The intertwining of religious tradition and secular observance is a fact of American life. Accepting the legalization of Sunday as a day of rest does not require the pretense that Sunday is not also a religious day. But as long as the secular element is dominant, government action is not rendered constitutionally infirm by the presence of some religious implications.[2] The principled approach to Establishment Clause doctrine recognizes that it is simply not possible to eliminate all incidents of religious tradition without simultaneously obstructing legitimate government activity.[3]

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[2] In his concurring opinion in *McGowan*, Justice Frankfurter observed, at 366 U.S. 503, 504: "... Cultural history establishes not a few practices and prohibitions religious in origin which are retained as secular institutions and ways long after their religious sanctions and justifications are gone...."

[3] In a separate opinion in *McCollum* v. *Board of Education*, 333 U.S. 203, 235, 236 (1948), Justice Jackson stated: "... But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture without the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet, the inspirational appeal of religion in these cases is often stronger than a forthright sermon.... Certainly, a course in English literature that omitted the Bible and other beautiful uses of our mother tongue for religious ends would be pretty barren.... The fact is that, for good or for ill, nearly everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples."

Given the religious threads in American history and culture, some accommodation by government to religion is both inevitable and permissible under the First Amendment. In *Zorach* v. *Clauson*, 343 U.S. 306 (1952), this Court held that public school systems could adopt cooperative programs to permit private schools to conduct religious education. Religion is the clear beneficiary of such programs, but that fact does not make the government action promotional of religion. Government may merely acknowledge, without sponsorship, the religiosity of the American people. In *Zorach*, this Court, at 343 U.S. 313, said:

> "We are a religious people whose institutions presuppose a Supreme Being."

Failure to permit public recognition of the religious element in American life would "...read into the Bill of Rights...a philosophy of hostility to religion." 343 U.S. 313. In *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), this principle was reiterated at 374 U.S. 212, 213:

> "It is true that religion has been closely identified with our history and government. As we said in *Engel* v. *Vitale*, 370 U.S. 421, 434 (1962): 'The history of man is inseparable from the history of religion...' The fact that the Founding Fathers believed devotedly that there was a God and that the inalienable rights of man were rooted in Him is clearly evidenced in their writings from the Mayflower Compact to the Constitution itself.... It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people...."

The constitutional line drawn by *Zorach* v. *Clauson*, *supra*, is a line between active government promotion of religion on the one hand, and passive government recognition of religion on the other. Compare *McCollum* v. *Board of Education*, *supra*. This line has been consistently adhered to by this Court.

Government may not financially aid institutions which are so permeated with religiosity that the aid inevitably reaches the religious function. *Lemon* v. *Kurtzman*, *supra*; *Meek* v. *Pittenger*, 421 U.S. 349 (1975). At the same time, however, aid to religious institutions whose secular function is separable is not an establishment of religion if the aid is confined to the secular activity. *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Board of Education* v. *Allen*, 392 U.S. 236 (1968); *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). Religious materials may not be used in public elementary schools for religious exercises, but those same materials can properly be presented for secular educational purposes if their instructional objectivity is preserved. *Abington School District* v. *Schempp*, *supra*.[4] Since religiosity

[4] In *Abington School District* v. *Schempp*, *supra*, Justice Brennan's concurring opinion stated as follows, 374 U.S. 303, 304: "...As we said in *McGowan* v. *Maryland*, 366 U.S. 420, 442, 'the "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.'...This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus, reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." The use of the creche in the subject holiday celebration merely recognizes the fact that the American folk celebration of Christmas originated for many as a commemoration of an historical event. Thus, including the creche in a secular celebration of the legal holiday of Christmas is no more of a religious exercise than the singing at state-sponsored functions of the second verse of "The Battle Hymn of the Republic," which contains an allusion to the same historical event. In *Engel* v. *Vitale*, *supra*, at 370 U.S. 435, n. 21, this Court was careful to note: "There is, of course, nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's expression of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance."

is a matter of degree, the permissibility of government contact depends to a considerable extent upon the remoteness or the immediacy of the religious element impacted by the government action. *Hunt* v. *McNair*, 413 U.S. 734 (1973).[5]

Critical to any constitutional examination of government action which is impacted by religiosity is the context within which the religious component is introduced. Although some study of the Bible or of the Ten Commandments can be a legitimate function of public education, the manner in which it is presented determines its neutrality. *Abington School District* v. *Schempp*, *supra*; *Stone* v. *Graham*, 449 U.S. 39 (1980).[6] If the religious component in American culture is singled out by government to be offered for its religious significance, then government is promoting the religiosity. *Engel* v. *Vitale*, 370 U.S. 421 (1962). But if the context is secular and the accommodation to religion is passive, the test of neutrality has been met. *McGowan* v. *Maryland*, *supra*; *Zorach* v. *Clauson*, *supra*. At root, the Establishment Clause issue in any case is whether the basic content of the governmental activity is secular or religious, and that issue can only be resolved with reference to the context in which the activity takes place.

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[5] In *Committee for Public Education* v. *Nyquist*, *supra*, at 413 U.S. 760, this Court declared: "... Yet, despite Madison's admonition and the 'sweep of the absolute prohibitions' of the Clauses, this Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under the Clauses have presented some of the most perplexing questions to come before this Court."

[6] The opinion of the District Court herein rejected this portion of the City's position by concluding that, "... This argument would permit government to teach the religious message of the Bible because that document also has literary, social and historical value." (Cert. Pet. A-43) But any exposition of the Bible inevitably introduces its religious message, and only the context of its presentation can preserve its objectivity. For example, Chapter One of the Book of Genesis categorically asserts that God created the world, and that assertion is an inevitable incident of any presentation of that material. Its literary, social, and historical value neutralizes its religious content but certainly cannot remove that content.

Public observance of legal holidays implicates the principles of government accommodation to religion which have been invoked by this Court. The national legal observance of Thanksgiving Day is a secular public activity traceable to an historically religious event.[7] Its religious content is historical fact, and its secularization is contemporary fact.[8] If government can constitutionally observe the holiday, it is because, like Sunday, its religious past has been submerged in its present secular character, and that secular character is an independent justification for its contemporary recognition. The decisions below have held that government may observe the Christmas holiday only by expunging from its observance all evidence of its religious tradition.[9] Petitioners submit that the Establishment Clause as applied by this Court does not justify

[7] In *Zorach* v. *Clauson*, *supra*, this Court took note of the religious content of the Thanksgiving holiday and affirmed the legitimacy of its celebration. At 343 U.S. 312, 313, the Court stated: "The First Amendment, however, does not say that in every and all respects there shall be a separation of church and state. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.... Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'So help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies, would be flouting the First Amendment...."

[8] When President Lincoln revived the Thanksgiving holiday first established by President Washington, he stated: "Now, therefore, in compliance with the request, and fully concurring in the views of the Senate, I do by this my proclamation designate and set apart Thursday, the 30th day of April, 1863, as a day of national humiliation, fasting, and prayer. And I do hereby request all the people to abstain on that day from their ordinary secular pursuits, and to unite at their several places of public worship and their respective homes in keeping the day holy to the Lord and devoted to the humble discharge of the religious duties proper to that solemn occasion." *Messages and Papers of the Presidents*, Bureau of National Literature, Inc., 1897, Vol. VIII, p. 3368; see also Vol. I, p. 56.

[9] As the dissenting opinion below points out, it would not be possible to remove all religious content from Christmas unless its name were changed and its customary celebration (e.g. the playing of carols) significantly altered. See *Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980), *cert. den.* 449 U.S. 987 (1980).

such a result and that such a requirement would convert the principle of neutrality into a principle of hostility.[10]

The American Christmas celebration is a national folk festival rooted in the biblical story of the nativity but with secular characteristics which have dominated for at least a century.[11] The folk aspects of the American Christmas began to emerge in the early part of the last century.[12] Many of its customs and symbols are borrowed from European countries.[13] But the American Christmas is distinctive and indigenous.[14]

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[10] Petitioners submit that any benefit to religion resulting from a contextually balanced inclusion of a creche in a Christmas display is surely far less than the benefit to religion resulting from Sunday closing laws. See *Giannella*, "Religious Liberty, Non-Establishment and Doctrinal Development, Part II, the Non-Establishment Principle," 81 Harv. L. Rev. 513, 532 (1968).

[11] "Thus by the latter part of the last century, the folk-secular aspects of Christmas were taking precedence over its religions ones." Barnett, *The American Christmas*, The MacMillan Company, 1954, p. 23. But even earlier, secularization had begun to crowd out the religious elements of the holiday celebration. The same author, at p. 6, observes: "In 1827 Bishop Chase, an Episcopalian, wrote to his wife: 'The devil has stolen from us ... Christmas, the day of our spiritual redemption and converted it into a day of wordly festivity, shooting and swearing.' His words were prophetic of the increasing secularization of Christmas which occurred in the United States during that century. In an indirect way this process was probably influenced by the separation of church and state established by the American Constitution in 1791. Because of this, members of the Puritan and evangelical churches were less inclined to oppose the secular celebration when it no longer symbolized the religious and political dominance of the Church of England. This tolerance increased during the nineteenth century and undoubtedly encouraged popularity of the folk festival."

[12] "In the first half of the nineteenth century, the Sunday school was initiated in this country. Christmas celebrations held in these schools did much to promote the general acceptance of folk customs, such as the use of the Christmas tree and Santa Claus." Meyers, *Celebrations: The Complete Book of American Holidays*, Doubleday & Company, Inc., 1972, p. 315.

[13] Miles, *Christmas Customs and Traditions*, Dover Publications, Inc., 1976. (republication of 1912 original)

[14] "Another powerful force which supports the American Christmas cult is the belief that it is a vital and unique symbol of our national life and culture. Significantly, this view prevails both in the United States and in other countries. This is especially true of the folk Christmas, which reflects American secular culture more extensively than does religious observance of the occasion. It has become so intimately identified with national life that adoption

Its multi-faceted themes are interwoven into a unitary celebration of colorful diversity.[15] Christmas carols and the writings of Dickens, Santa Claus and his reindeer (including the still developing legend of Rudolph), gift giving and Christmas cards, special food and drink, trees, candles, holly, mistletoe, and poinsettia — all of these and more are identified (together with the creche) in the distinctively American celebration. It is because of this mix that Christmas is a legitimate legal holiday.[16] The creche is not foreign to it or separate from it, but rather, it is an integrated part of the whole.[17]

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of the Santa Claus figure, the Christmas tree, and gift exchanging now demonstrate an important stage of acculturation for recent immigrants. Americans also show a pronounced inclination to believe that Christmas, in some form, is celebrated by all people of the world. This is simply not true, and the belief clearly indicates an unconscious attempt to generalize from our own national festival." Barnett, *supra*, pp. 141-142

[15] In his concurring opinion in the Court of Appeals, Judge Bownes, having reference in part to Meyers, *supra*, notes a few of the secular themes, e.g., Dickens, the Christmas tree, and Santa Claus. (Cert. Pet. A-15). The complete listing of headings and subheadings in Meyers, *supra* (pp. 309-344), in order, is as follows: Mithraic Influences on Christmas; The Saturnalia of Rome; Puritan Opposition to Christmas; Christmas in the New World; A More Joyous Approach; Growth of Christmas Celebrations; Christmas Follows the Frontier; Legal Recognition of Christmas; St. Nicholas; Kriss Kringle; the Cartoon Contribution of Thomas Nast; Christmas Carols; The Custom of Caroling; Amahl and the Night Visitors; Yule and the Yule Log; Burning of the Yule Log; Christmas Candles; Christmas Cards; Christmas Greeting Cards Reach America; Christmas Foods; Feasting in America; Mince Pie and Plum Pudding; Christmas Cheer: The Wassail Bowl; Cookies; The Creche; The Christmas Tree; Christmas Tree in America; The Various Ways of Ornamentation; The Tree's Popularity in Europe; Lighting Up the Modern Tree; Christmas Greenery; General Customs Relating to Greenery; Holly; Mistletoe; The Poinsettia; Rosemary; Laurel; Christmas Superstitions and Miscellaneous Customs; Animal Superstitions; Weather Predictions; Other Christmas Beliefs; The Custom of Mumming; Gift-Giving and the Christmas Spirit. The author's placing of "The Creche" between "Cookies" and "The Christmas Tree" scarcely accords a dominating religious significance to that symbol.

[16] See, e.g., 5 U.S.C. Section 6103 R.I. Gen. Laws, 1956, 1979 reenactment, Section 25-1-1.

[17] In its opinion, the District Court said that there are "two Christmases", one the secular and the other religious. "Janus-like, it is one holiday with two distinct and very different faces." (Cert. Pet. A-41) It is respectfully submit-

What has evolved in the American tradition from the religious theme of Christmas is a general humanistic tone of brotherhood, private charity, and good will.[18] Although this humanism is derivative from the religiosity, it is now totally independent of it and constitutes a major modern secular theme of the American Christmas.[19] So, too, the nativity scene has developed into a component of Christmas art, which is an

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ted that such an analysis is unrealistic. The fact of the matter is that "... the past and the present, the religious and the secular, are fused in the pattern of the national festival so that it draws vitality from many and varied sources. This has given the celebration an appeal that often transcends the restrictions of belonging to certain age, sex, religious, and economic groups, and promotes a wider sense of human brotherhood." Barnett, *supra*, pp. 145, 146. Christmas is no more "Janus-like" than is Sunday or Thanksgiving Day, currently secular observances with religious origins and residual religious characteristics.

[18] "Soon, 'good will toward men' and 'alms to the needy' became the melody of 'the Christmas carol,' a theme quite in harmony with growing skepticisms, growing populations, industrial expansion, and the new *liberte, fraternite, et egalite*. Social concern was elbowing out adoration as the major concern of man, and a new sort of mid-winter rite had arrived, its spirit centered on the fortunes of Tiny Tim and the reformed Scrooge; on the *New York Times* '100 Neediest Families'; on Woody Guthrie's Pretty Boy Floyd who responds to slurs that he's 'an outlaw' and 'a thief' with the rebuttal, 'Well, here's a Christmas dinner for the families on relief.' " Coffin, *The Book of Christmas Folklore*, The Seabury Press, 1973, p. 16. The theme of peace, also evoked from the religious roots, is a strong element in the contemporary humanism of Christmas. See, e.g., *Eleanor Roosevelt's Christmas Book*, Dodd, Mead & Company, 1963.

[19] "The giving and receiving of gifts turned into an integral part of the season when the Christkindl became Kriss Kringle and Sinterklass was anglicized into Santa Claus, and the two became identical in the popular mind as a symbol of the generosity of the Christmas spirit." Meyers, *supra*, p. 344. The District Court concluded that the good will value in the Christmas tradition, even though secular, was not dominant, because it "flows from", the fundamental religious significance of Christmas. (Cert. Pet. A-48) But it is respectfully submitted that all contemporary secularization which has a religious origin "flows from" its religious background. The observance of Sunday as a day of rest was an historical outgrowth of the day's religious observance. And the contemporary Thanksgiving Day celebration originated in a religious event, but it is the contemporary secularity and not its religious origin which determines the character of its present observance. The fact is that the dominant themes of the modern American Christmas are brotherhood, family life, private charity, and commercialism.

important element in the national festival.[20] Both the humanistic quality of the contemporary celebration and the artistic employment of the nativity scene represent the secularization of the religious origins of the holiday. Religious traditions have survived in the celebration of many American ethnic groups, but those traditions have merged into the dominantly secular modern national festival.[21]

The record in this case shows a completely typical American Christmas celebration. The City-sponsored holiday activities are spread out at four locations.[22] Santa Claus presides over free rides at the carousel in the municipal park.[23] The City Hall is decorated and lighted.[24] The municipal ice rink is decorated and is the site for a Christmas party for the mentally retarded.[25] There is caroling.[26] The Hodgson Park display (where the creche is located) has a live Santa Claus who distributes candy after arriving on a fire truck.[27] The Hodgson

[20] "Festivals are preserved through art forms, and Christmas has accumulated a rich and distinctive body of songs, stories, poems, pictures, and plays. These embody its traditions and meanings and transmit them from generation to generation. In this country they also mirror important episodes in the development of the festival and reveal the steady growth of secular influences in the national Christmas. . . . The major portion of traditional Christmas art has long been concerned with the Nativity theme, and this fact probably retarded its development somewhat in the United States." Barnett, *supra*, p.102.

[21] "Much of the emphasis on profound worship that now shows itself in the American Christmas owes its vigor not to the mainstream English stock, but to later immigrants, to the Catholic Irish, Italians, Slavs, Poles, and Latins, to the Lutheran Germans, who have come from areas where the medieval concept of the Christmas holyday was never assaulted as it was in Anglican lands. With their pyramids of candles, their creches, poinsettias, and *tannenbaums*, they have brought back into the commemoration a wonder that had almost disappeared. As they have shared their ways with their English neighbors, intermarried, and demanded attention, the Christmas of late twentieth-century America has crystallized—an incredible mix of Mass and the masses, miracles and eggnog, camels and reindeer, ecstasy and commercial agony undreamed of in the *auld lang syne*." Coffin, *supra*, p. 16. And the unmistakable commercialism of the contemporary Christmas in the United States adds significantly to the secularity of the holiday. Barnett, *supra*, Chapter IV, pp. 79-101.

[22] (J.A. 52, 53)

[23] (J.A. 53)

[24] (J.A. 52, 53)

[25] (J.A. 53)

[26] (J.A. 53)

[27] (J.A. 52, 53)

Park display itself is a potpourri of American Christmas symbolism: lights, trees, snowmen, Santas, reindeer, a variety of figurines, stars, and bells.[28] The solitary trace of religiosity in the entire municipal celebration is the creche. In its context it is a passive and non-promotional acknowledgment that the nativity is one of the roots in the American Christmas tradition. The role of the creche in the City's Christmas celebration is no different in kind or in degree from the role of religion in the holiday itself.[29] Many of the contemporary symbols of Christmas once had religious significance.[30] Of all the Christmas symbols, the creche alone retains some religious significance in a religious setting, but in the context of a conventional Christmas display, even the creche is still primarily a symbol of the Christmas season.[31] The presence of the creche

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[28] (J.A. 40, 47, 51, 52)

[29] See *Allen* v. *Morton*, 495 F.2d 64 (1973). The District Court in this case expressed suspicion that the cultural and traditional use of the nativity as a holiday symbol was really a disguise for promoting its "fundamentally theological message." (Cert. Pet. A-55) But on the record in this case, it is submitted that the "disguise" is so overwhelmingly secular as to render the religious message virtually indecipherable. There is a religious "message" in the mere acknowledgment of Thanksgiving Day, but that message is effectively lost in the holiday's contemporary celebration.

[30] The "Paradise Tree," introduced by Christians in the fifteenth or sixteenth century, was the progenitor of the modern Christmas tree. The familiar Christmas star derived from the Star of Bethlehem. Santa Claus is the modern version of St. Nicholas, a fourteenth century archbishop, whose church vestments are responsible for the familiar red and white Santa suit. Holly was introduced as a liturgical symbol. Coffin, *supra*, pp. 19, 22, 76; Meyers, *supra*, pp. 328, 331, 332, 336; Miles, *supra*, pp. 271, 275.

[31] In its opinion, the District Court stated: "In sum, the Court does not understand what meaning the creche, as a symbol, can have other than a religious meaning." (Cert. Pet. A-47) However, as the dissenting opinion below pointed out, "...but creches and Santas in December are as typically symbolic of Christmas as turkeys and pilgrims in November are symbolic of Thanksgiving." (Cert. Pet. A-18) Where the character of the governmental action is ambiguous, there is no Establishment Clause violation. Tribe, American Constitutional Law, The Foundation Press, Inc., 1978, pp. 827-829. At p. 828, the author asserts: "...Thus, when a government program has the effect of fostering, tolerating, or encouraging—but not mandating—an activity, the fact that the activity is only *arguably* religious is *not* enough to make the government program a violation of the establishment clause; as long as the activity is arguably *not* religious, the establishment clause has not been violated by its facilitation. ..." (emphasis in original)

in the Christmas celebration—without comment and without use in a religious exercise—simply acknowledges one element of the American Christmas tradition in a manner which makes no attempt to promote such religious content as it might contain in other settings.

The City's celebration of Christmas is a secular activity as the Christmas holiday is itself secular. The inclusion of a creche in one portion of that celebration no more converts the activity into a promotion of religion than does the title of the Christmas holiday convert its legalization into a governmental religious observance. There is religiosity in Christmas as there is religiosity in Sunday and in Thanksgiving, but that religiosity is overshadowed by a dominant secularization. The Establishment Clause decisions of this Court do not require government to eradicate all religious components in a secular activity. To the extent that the nativity theme is historically part of the secular American Christmas its passive acknowledgment by government is not an establishment of religion. To prohibit such passive acknowledgment would subvert rather than promote the values of the Clause.

B. *The City's Christmas Celebration Is Not a Religiously Discriminatory Action Requiring Strict Scrutiny and a Compelling Justification.*

In *Larson* v. *Valente*, *supra*, this Court invalidated a portion of a Minnesota statute dealing with registration and reporting requirements for charitable organizations. While requiring charitable institutions to register and report contributions, the statute exempted those religious organizations which obtain more than 50% of their total contributions from members or affiliated groups. The decision concluded that the statute was facially discriminatory against certain churches placing not insignificant burdens on some and according not insignificant benefits to others. As a result of this facial discrimination, the statute was held to be suspect thus requiring strict scrutiny and

the establishment of a compelling state interest for its justification. Concluding that the statutory provisions were not closely fitted to protection of the asserted compelling interest, this Court held that the statute violated the Establishment Clause.

In the case at bar, the Court of Appeals held that *Larson* v. *Valente*, *supra*, applied to the City's Christmas celebration because "...the City's ownership and use of the nativity scene is an act which discriminates between Christian and non-Christian religions...". (Cert. Pet. A-11) Adopting the conclusion of the District Court that the City's sponsorship lacked a secular purpose, the Court of Appeals concluded that *a fortiori* there could be no compelling state interest in an activity impelled by a religious purpose. The essence of the Court of Appeals decision is that the role of the nativity makes the contemporary celebration of Christmas suspect because the nativity theme is discriminatory and, therefore, public observance of Christmas must eliminate the nativity scene.

In *Larson* v. *Valente*, *supra*, this Court stated that "...the *Lemon* tests...do reflect the same concerns that warranted the application of strict scrutiny to [the Minnesota statute]...". 456 U.S. 252, 102 S.Ct. 1678. More specifically, the decision concluded: "It is plain that the principal effect of the 50% rule...is to impose the registration and reporting requirements of the act on some religious organizations but not on others." 456 U.S. 252, 102 S.Ct. 1678. It was because the statute was facially discriminatory among churches that "strict scrutiny" was required to determine whether it could be justified.

In this case, however, it is the facial impact of the City's action which is in issue. If the City's action is the secular celebration of a legitimate national holiday, there clearly is no facial religious discrimination in that action. The determination of the character of the governmental activity has been made by this Court through the application of the *Lemon* tri-partite test. *Conrad* v. *City and County of Denver*,

__ Colo. __, 656 P.2d 662 (1982).[32]. Thus, what was the premise for the application of strict scrutiny in *Larson* v. *Valente, supra*, is the issue to be determined herein.

The Court of Appeals in its decision in this case applied strict scrutiny through adoption of the District Court conclusion that the first part of the *Lemon* test had been violated. Its reasoning was that since the City's sponsorship of the creche had no secular purpose, "...it follows inexorably that defendants established no compelling government interest in erection of the nativity scene." (Cert. Pet. A-12) But its application of strict scrutiny was premised upon the unelaborated assertion that the City's sponsorship was discriminatory. (Cert. Pet. A-11) That assertion appears to have been based upon the Court's conclusion that the City's sponsorship lacked a secular purpose under the *Lemon* test. Thus the decision of the Court of Appeals reached its strict scrutiny analysis only after applying the tri-partite test and concluding that it had been violated.

This Court has made clear that the application of Establishment Clause principles to government action is not dependent upon or limited to any single test. The tests are but guidelines for the application of the principles. In *Meek* v. *Pittenger, supra*, at 421 U.S. 358, 359, the relationship of the *Lemon* tests to the constitutional principles was described as follows:

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[32] *Conrad* v. *City and County of Denver, supra*, dealt with a challenge to the use of a creche in the Christmas celebration of the City of Denver. The Supreme Court of Colorado held that *Larson* v. *Valente, supra*, was inapplicable because the facial character of the Christmas display was the matter in dispute. At 656 P. 2d 672 the Court stated: "While the strict scrutiny test applied in *Larson* v. *Valente* was not designed to aid in the sensitive line-drawing process necessary to determine whether particular governmental activity constitutes unconstitutional preferential treatment of religion, we believe that the test set forth in *Lemon* v. *Kurtzman, supra*, was specifically formulated for this purpose. Recognizing that the Establishment Clause does not contain 'precisely stated constitutional prohibitions,' the United States Supreme Court formulated the three-part test in *Lemon* v. *Kurtzman* with reference to the 'three main evils against which the Establishment Clause was intended to afford protection' to aid in determining whether particular governmental conduct crosses the line into the zone of forbidden activity. . . ."

> "These tests constitute a convenient, accurate distillation of this Court's efforts over the past decade to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws 'respecting an establishment of religion' and thus provide the proper framework of analysis for the issues presented in the case before us. It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired."

Since the premise of the Court of Appeals' decision in employing strict scrutiny was that the governmental action was religiously discriminatory, that decision both implicitly and explicitly required the application of the tri-partite test. Thus, it is the application of that test which is necesary for an accurate constitutional analysis of the issue presented in this case.

C. *The Inclusion of a Creche in a Traditional and Diverse Public Christmas Celebration Has a Secular Purpose, Has No Primary Religious Effects, and Does Not Foster Excessive Entanglements.*

The settled framework for the application of the Establishment Clause to government action is the tri-partite test: (1) the action must have a secular purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster excessive governmental entanglement with religion. *Lemon* v. *Kurtzman, supra.* The parts of the test are no more than "helpful signposts" for implementation of the Establishment Clause. *Hunt* v. *McNair*, 413 U.S. 734, 741. In this case, the District Court held that the City's inclusion of the nativity scene in its Christmas celebration violated

each portion of the tri-partite test. The Court of Appeals agreed with the District Court and adopted its reasoning with respect to the purpose and effect portions of the test but did not affirm the District Court's conclusion as to entanglement.

Applying the Test

It is respectfully submitted that the basic fallacy in the decisions below lies in their isolated treatment of the creche as a dominantly religious symbol. On the record in this case, the simple fact is that the City is not sponsoring a creche but rather is sponsoring a Christmas celebration, a small portion of which includes a creche. The creche is part of the municipal Christmas celebration because it is a part of Christmas, and to examine the sponsorship of the creche as an isolated activity is an unrealistic assessment of what the City is doing. The sponsorship of the creche has no independent purpose or effect; it merely subserves the large purpose and effect of the municipally-sponsored holiday observance. It is surrounded by a plethora of secular holiday symbols. The display of which it is a part is maintained on the grounds of a museum in a commercial area in close proximity to the City Hall, which is also decorated in a Christmas motif. Christmas music is played both at the Hodgson Park display and at City Hall. The objective and function of the creche can only be determined in the context of its environment and in the context of the City's celebration of Christmas.[33]

[33] The District Court opinion stated that the City's argument "overstates" the role of context in applying the tri-partite test. (Cert. Pet. A-51). It is respectfully submitted that under all of the decisions of this Court, it is difficult, if not impossible, to overstate the importance of context, because it is the context which gives meaning and content to the government action. In *Abington School District* v. *Schempp*, at 374 U.S. 225, this Court stated: "...Nothing we have held here indicates that such study of the Bible or of religion, when presented objectively *as part of a secular program* of education may not be effected consistently with the First Amendment." (emphasis added) The decisions of this Court have made it clear that the degree of secularity inhering in the government action as a whole principally determines the application of the tri-partite test.

In *Stone* v. *Graham*, 449 U.S. 39 (1980), this Court invalidated a statute mandating the posting of the Ten Commandments in public schools. This Court concluded that the "... pre-eminent purpose for posting the Ten Commandments on school-room walls is plainly religious in nature." But in so doing, this Court emphasized the importance of context in the application of the tri-partite test:

> "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like... Posting of religious texts on the walls serves no such educational function...".

This Court explicitly recognized in *Stone* that the function of the display could only be ascertained from its setting, and isolated as it was in the context of a public school classroom, its religiosity predominated. It is the contextual isolation of the religiosity which accentuates the promotionalism in the government conduct. *Engel* v. *Vitale*, *supra*. This is especially true of symbolism which necessarily achieves an impression by drawing upon its setting.

In ascertaining the purpose and effect of the City's conduct in this case, it is just as arbitrary to isolate the nativity scene from the Christmas celebration as it would be to isolate the individual items in the nativity scene from each other. A small manger in and of itself has no religious significance. Nor does a figurine of a sheep or a king or a shepherd. Obviously, however, these gain meaning only by being integrated into the scene of which they are component parts. Their meaning is in their context. In applying the tri-partite test, the same is true of the Christmas display of which the creche is a part and the Christmas celebration of which the display is a part. Through

integration with each other, the items in the creche represent the nativity scene, and through integration with all of the other symbolism, the nativity scene represents a public celebration of the national festival of Christmas.

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court applied the tri-partite test to the use by students of public university facilities for the purposes of religious worship. This Court expressly rejected the argument that the tri-partite test should be applied to the religious exercises which the students desired to conduct. Rather, it was held that the appropriate focus for the application of the tri-partite test was the university's generalized policy of making its facilities available to student groups. In so holding, this Court, at 454 U.S. 263 at 273, 275, said:

> "The university's argument misconceives the nature of this case. The question is not whether the creation of the religious forum would violate the Establishment Clause. The university has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech...
>
> "...At least in the absence of empirical evidence that religious groups will dominate UMKC's open forum, we agree with the Court of Appeals that the advancement of religion would not be the forum's 'primary effect'."

As *Widmar* demonstrates, if challenged government action is not placed in its fair and realistic context, the application of Establishment Clause values can become distorted. In that case, the university's permission for the religious use of its facilities could not be viewed in isolation, because that would not represent an accurate picture of what the university was doing. Only by relating the specific student request to the university's policy with respect to other student requests for

facility use could the tri-partite test receive a meaningful application. Disregard of context defeats the purpose of the tri-partite test, because it assumes that the religious element in a government program is the only relevant point of inquiry for Establishment Clause purposes.

In the case at bar, examination of the creche out of its context will inevitably produce a distorted application of the *Lemon* test. Such an examination assumes either (1) that the only part of the governmental action which is constitutionally significant is the creche itself or (2) that the inherent religiosity of the nativity scene so overpowers the secular elements of the City's Christmas celebration as to make them irrelevant to the constitutional issue. On either assumption, the test is not being applied to the entire municipal activity, and it is for that reason as defective an application as that advanced by the university in *Widmar* v. *Vincent*, *supra*, and rejected by this Court.

The basic question to be determined by the application of the tri-partite test to the facts of this case is whether the City is promoting religion or is simply celebrating Christmas. That question can only be answered by relating the sponsorship of the creche to the City's sponsorship of its Christmas celebration. If a creche in its setting gave to a Christmas celebration a dominant and promotional religious content, then the celebration might not pass muster under the tri-partite test. But if the celebration as a whole, including the creche, retains a dominant secular tone as a traditional holiday observance, then the application of the tri-partite test will not result in an Establishment Clause violation. It is submitted that on the record in this case, the City's Christmas celebration is clearly secular, and the inclusion of the creche does nothing to alter that conclusion.

Secular Purpose

The City has asserted a series of purposes for its Christmas observance, the first of which is the advancement of the holiday tradition.[34] Secondarily, the celebration is part of ongoing efforts to promote the central City area as an attraction for the public and, more specifically, to promote retail activity during the Christmas season.[35] There is a consistent municipal policy of celebrating national holidays which is implemented by the sponsorship of parades on Veterans' Day and Memorial Day and of a fireworks display on the Fourth of July.[36] The Christmas activities are connected with this holiday policy. In addition, other promotional celebrations are conducted in the downtown area at other times during the year.[37] Considerable effort and financial resources have been devoted in recent years to the development of the central City, and the various promotional activities have been coordinated with those efforts.[38]

The existence of a legitimate secular purpose may exist even where there is an admittedly religious background for the governmental action. *McGowan* v. *Maryland*, *supra*. In the case of financial aid to religiously permeated institutions, the promotion of educational objectives has been held by this Court to constitute valid secular purpose. *Committee for Public Education* v. *Nyquist*, *supra*; *Lemon* v. *Kurtzman*, *supra*; *Meek* v. *Pittenger*, *supra*. Only where the government sponsorship is totally lacking a secular motivation will it be invalidated under the first portion of the tri-partite test. *Epperson* v. *Arkansas*, 393 U.S. 97 (1968); *Abington School District* v. *Schempp*, *supra*; *Stone* v. *Graham*, *supra*. Even a direct and substantial benefit to religion may have a legitimate

[34] (J.A. 109)
[35] (J.A. 107, 110, 111)
[36] (J.A. 54, 110, 111)
[37] (J.A. 110, 111)
[38] (J.A. 110, 111)

secular purpose. *Larkin* v. *Grendel's Den, Inc.*, U.S. , 102, S.Ct. 1765 (1982) And this Court has specifically held that the presence in the public activity of non-religious elements confirms and strengthens the assertion of a secular purpose. *Walz* v. *Tax Commission*, 397 U.S. 664 (1970).

In this case, the City's policy of celebrating public holidays is sufficient secular purpose in itself. If the legislature can validly declare Christmas to be a legal holiday, then government should be able to celebrate it as such. The fact that the City also celebrates Veterans' Day, Memorial Day, and the Fourth of July gives further substance to the credibility of the stated purpose. In addition to the holiday celebration itself, however, there are additional purposes put forth by the City which would in any event satisfy the first prong of the tripartite test. Promotional development of the downtown area of the City is unquestionably assisted by colorful displays and decorations which tend to attract the public, and the overall celebration is a direct benefit to the mercantile activities, which are heavily dependent upon the Christmas season for their successful operation.[39]

In *Stone* v. *Graham*, *supra*, this Court held that the mandatory posting of the Ten Commandments in classrooms could have no purpose other than a religious one. But in so holding, this Court emphasized that it was not the religious character of the Ten Commandments which made the public purpose infirm but rather the manner in which the statute required the symbolism to be employed. This Court expressly recognized that had the Ten Commandments been somehow incorporated into the educational function, their use would evidence a legitimate secular purpose. This is consistent with this Court's earlier conclusion that tax exemptions given non-religious institutions supported the legitimacy of the asserted secular purpose in according such exemptions to churches. *Walz* v. *Tax Commission*, *supra*. The nature of the implementation is strong evidence of the real content of the purpose.

[39] (J.A. 132, 133)

In this case, the District Court rejected the City's statement of secular purpose and concluded that the nativity scene in the Christmas celebration was necessarily religious in its objective. The Court of Appeals affirmed this portion of the District Court decision. It is respectfully submitted that this conclusion flows from two errors: (1) the failure to recognize that the creche is one of the symbols of Christmas and (2) the refusal to view the creche as an integrated portion of a larger celebration which serves only the purposes of that larger celebration. Even standing alone, the creche could fail to advance the City's celebrational purpose only if it had no meaning at all as a symbol of Christmas; the objective of observing the Christmas season can be accomplished by employing any legitimate and secular Christmas symbol. More importantly, however, impugning the City's assertion of celebrational and promotional secular purpose requires a disregard of the fact that, except for the creche, the celebration is exclusively secular. The use of the many varied secular symbols is cogent support for the City's position that its objectives are secular. The District Court "readily disposed" of a portion of the City's assertion of purpose by finding that the same purpose could be achieved without the creche.[40] But it is respectfully submitted that such reasoning is convoluted, because the question is not what the purpose would be without the creche but rather what is its purpose as it stands. In its context, the creche serves the same celebrational purpose as all of the other components of the Christmas observance.

If the City were not advancing a secular purpose in this case, it surely would have given vastly different treatment to the religious content in the Christmas holiday. Displaying a solitary creche, overpowering it with secular symbolism, giving no written explanation of its religious background or its

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[40] (Cert. Pet. A-54)

religious content, and failing in any way to use it as part of a ceremony or exercise is hardly consistent with the promotion of a religious objective. The overall tone of the City's Christmas observance belies the existence of a religious purpose. That tone is far more consistent with a policy of celebrating national holidays than it is an attempt to promote or endorse religion. The figures in the creche do no more to advance the City's purpose than do the figures of snowmen, Santa Claus, reindeer, cartoon characters, and all the other symbolism of which the creche figures are a part. As the dissenting opinion below said:

> "Unassociated, as they were, with the performance of any religious rites, the figures did not 'establish' religion in the context in which they were presented. They simply contributed to the message that the holiday they represented was at hand."

Nonreligious Primary Effects

Whatever its purpose, direct government support of an activity which is permeated with religion has a primary effect of advancing religion in violation of the Establishment Clause. *Committee for Public Education* v. *Nyquist, supra; Lemon* v. *Kurtzman, supra; Meek* v. *Pittenger, supra.* So, too, does a direct benefit to religion which constitutes the principal result of the government action. *Larkin* v. *Grendel's Den, Inc. supra.* The religious effects must be both direct and primary.[41] Even though the activity assisted is permeated with religiosity, limited government support palpably secular in nature does

[41] "But an indirect and incidental benefit to religion has never been thought a sufficient effect to warrant the invalidation of a state law." *Committee for Public Education* v. *Nyquist*, 413 U.S. 776.

not have an offending primary effect. *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Board of Education* v. *Allen*, *supra*. Conversly, where the activity supported is not permeated with religion — even though containing religious elements — direct and generalized support for the secular function will not clash with the "primary effects" portion of the tri-partite test. *Hunt* v. *McNair*, *supra*; *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976); *Tilton* v. *Richardson*, *supra*. And even where government policy directly results in religious activity, the policy does not have a primary effect of advancing religion unless the religious result is dominating. *Widmar* v. *Vincent*, *supra*.

A major premise of the "primary effects" portion of the test is that some religious content may inhere in government action without offending the First Amendment. Only by relating the religious element to the entire activity can it be determined whether the benefit to religion is disqualifying. Clearly, any government contact with religion gives the public program a religious effect but just as clearly, this Court has held that such a religious effect will not necessarily abridge the Establishment Clause.[42] Only where the religious effect is a primary consequence of the governmental behavior will the tri-partite test be violated. The second major premise of the second part of the test is that not every primary religious effect will necessarily render government action unconstitutional. The effect must be one which either advances or inhibits religion. This, too, recognizes that not all religious content is necessarily promotional or restrictive, and the objective of the Establishment Clause is to prohibit government sponsorship of religion. Thus, the identification of religiosity in public activity triggers inquiry into its extent and its promotional content.

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[42] See Note, "The Establishment Clause, Secondary Religious Effects, and Humanistic Education", 91 Yale L. Journ. 1196 (1982).

Because the degree of religiosity is critical to an ascertainment of "primary" or "incidental" effects, the religious component must necessarily be examined in the light of the attendant secular characteristics of the action. If the religiosity were to be examined in isolation, every religious effect would make the government action infirm. Where the religious component dominates the public action, the only question is whether it advances or inhibits religion. *Larkin* v. *Grendel's Den, Inc., supra.* But where active religiosity is only one of many components of the government program, its relative importance to the program determines whether it is a primary effect. *Widmar* v. *Vincent, supra; Roemer* v. *Board of Public Works, supra.*

Petitioners respectfully submit that the inclusion of the creche in the City's Christmas celebration is neither a primary effect of the governmental action nor an advancement of religion. All of the primary effects of the City's sponsorship relate to the celebration of the national holiday. The function of the creche is likewise to celebrate the holiday, and although in other settings it possesses residual religious content, it does not in its context promote any message other than the observance of the national festival of Christmas. Unless the holiday itself is constitutionally infirm — a proposition not advanced in this case — the effect of the creche is no more primarily promotional of religion than is the legalization of the holiday.

The record in this case shows that the creche represents a small portion of the City's Christmas celebration. In the first place, the Hodgson Park display where the creche is included is only one of four components of the City's Christmas observance.[43] And even in the Hodgson Park display itself, the

[43] (J.A. 52, 53)

nativity scene is a subordinate component.[44] It occupies a relatively small portion of the total park area. It is heavily outnumbered and clearly overshadowed by a host of secular symbols.[45] Even if the creche were an exclusively religious symbol displayed in a manner promoting a religious message, it is such a minor component of the City's Christmas observance that it would not constitute a primary effect of the City's action.

Most of the decisions of this Court relied upon by the courts below in this case dealt with religion in the context of elementary and secondary education.[46] Indeed, the District Court in its discussion of "primary effect" strongly implied that the general public viewing the creche in the City's Christmas display would be in an analogous position to that of the school children involved in *Stone* v. *Graham*, *supra*, and *Abington School District* v. *Schempp*, *supra*.[47] However, this Court has long recognized the importance of the distinction between religious influences in elementary and secondary school settings and in other environments. *Hunt* v. *McNair*,

[44] The District Court in its decision accepted evidence that the nativity scene could be removed from the display without changing the display's impact. (J.A. 133, 139, 140, Cert. Pet. A-54) But since that is so, the creche must necessarily be secondary and incidental. If the purpose and primary effect of the display remain intact without the nativity scene, it is because the purpose and primary effect have little or nothing to do with the creche itself. On the other hand, as a symbol of Christmas the creche contributes to the overall secular purpose and effect of the celebration.

[45] In the Hodgson Park display, the creche is one among the following components: (1) a 40-foot high lighted Christmas tree; (2) a Santa Claus house; (3) a "talking" wishing well; (4) Old English musical group figurines; (5)a large wooden representation of Santa Claus and reindeer; (6) a miniature village in wood; (7) cartoon character cut-outs; (8) a number of wooden representatives of stars and trees: (9) a 48-foot by 4-foot sign which reads "Seasons Greetings"; (10) approximately 2500 colored lights. (J.A. 51, 52)

[46] "Most of the cases coming to this Court raising Establishment Clause questions have involved the relationship between religion and education." *Committee for Public Education* v. *Nyquist*, 413 U.S. 772.

[47] (Cert. Pet. A-62)

supra, *Tilton* v. *Richardson*, *supra*, *Roemer* v. *Board of Public Works*, *supra*.[48] The effect of religiosity in a university is clearly different from its effect in elementary and secondary schools.[49] On the facts of this case, the creche is being displayed in the presence of lighted Christmas trees, Santa Claus, a wishing well, and a host of diverting Christmas symbolism in an open area in the commercial center of the City frequented to a large degree by Christmas shoppers. The effect of the symbol in those circumstances cannot be compared with the effect it would have completely isolated in a public elementary school classroom.[50] It is respectfully submitted that context is more important in applying the "primary effects" portion of the tri-partite test than it is in applying the other two parts of the test because effect is largely determined by setting and the context makes the symbol what it is. In the case at bar, the context of the City's Christmas celebration makes the creche a holiday symbol.

The District Court acknowledged in its opinion in this case that "... if a 16th century Italian hand-carved nativity scene is included in a City-sponsored museum display of Renaissance objets d'art...", the context would neutralize the religiosity of the symbol.[51] But if that is true, then the same should be true of any generalized display of Christmas symbolism unless the quality of the art determines its effect. The fact is that the nativity scene is part of the artistic texture of the Christmas tradition.[52] The quality of its display does not affect its

[48] See Tribe, *supra*, p. 825.

[49] In *Widmar* v. *Vincent*, *supra*, this Court pointed out: "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion...". 454 U.S. 274, n.14. In this case, adult shoppers and those children whom the adults bring with them should be able to appreciate that the decorations in Hodgson Park are designed to celebrate the Christmas season.

[50] There is, of course, a coercive element in public school attendance. On the other hand, attendance at any part of the municipally-sponsored Christmas celebration in this case is entirely voluntary.

[51] (Cert. Pet. A-52)

[52] See Footnote 20, *supra*.

character as art, and whether it is presented in a classical context in a museum or in a popular context in a public display, its religious content is equally diluted by its setting. If it be conceded that artistic presentation gives dominant secularity to a religious theme, then the form and quality of that presentation can hardly be the measure of its secularity. The fact is that surrounding a creche with all of the secular symbolism of Christmas in the context of a generally secularized Christmas celebration gives the creche the same meaning as is given to the display as a whole.[53]

As pointed out in the dissenting opinion below, the creche is not employed in any kind of religious exercise, nor is it accompanied by any religious message. All of the activities which occur during the City's Christmas observance are purely secular in character: Christmas parties, visits with Santa Claus, and the like. The use of the creche is purely passive. Such religiosity as inheres in the symbol is muted, if not virtually eliminated, by its context. In all of the circumstances of its setting, all that it says is that the Christmas season has arrived. In view of the overwhelming secular character of the City's Christmas celebration, the inclusion of the creche does not constitute a primarily religious effect of advancing religion.

The Absence of Entanglements

The third portion of the tri-partite test advances the principle of neutrality by prohibiting government programs which create certain kinds of ongoing relationships with religion. *Walz* v. *Tax Commission, supra.* In the case of a subsidy to a religiously permeated private institution, a principal objective

[53] "It would be carrying the logic of the primary effect test to an unwarranted extreme to find in this case that appellant's proof that the creche was a patently religious symbol met its burden of showing that the Pageant is 'an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.' " *Allen* v. *Morton*, 495 F.2d 72 (1973)

of the "entanglements" doctrine is to avoid the political divisiveness which arises out of the administration of the program. *Lemon* v. *Kurtzman*, *supra*; *Committee for Public Education* v. *Nyquist*, *supra*.[54] But where the degree of religiosity of the subsidized institution is less pervasive and where its secular function is more readily separable, administrative involvement is permissible without violating the third portion of the tri-partite test. *Tilton* v. *Richardson*, *supra*. In such a case, the problem of political divisiveness does not arise, because the subject matter of the government action is secular and not religious. *Hunt* v. *McNair*, *supra*; *Roemer* v. *Board of Public Works*, *supra*. The political divisiveness which the test seeks to avoid is that which results from making government's contact with religion a subject of recurrent political debate.

In this case, there is no evidence of any outside administrative relationship created by the City in the conduct of its Christmas celebration, and the District Court so found.[55] There was, however, evidence that after this lawsuit was commenced, considerable public controversy arose. In the more than 40-year history of the City's Christmas celebration, including the creche, this was the first time political dispute had ever arisen concerning the City's Christmas observance. The

[54] In *Florey* v. *Sioux Falls School District*, *supra*, at 619 F.2d 1318, the Court of Appeals stated: "All the Supreme Court cases cited by the appellants in support of the 'entanglement' test deal with governmental aid to sectarian institutions, not with the permissible scope of activity in the public schools. In a 'parochaid' case, the court is presented with a situation in which the state is involving itself with a concededly religious activity or institution. The real danger is the potential for state repression of such institutions. In the present case, by contrast, the school district is called upon to determine whether a given activity is religious. This type of decision inheres in every curriculum choice and would be faced by school administrators and teachers even if the rules did not exist. Indeed, the rules are guidelines designed to aid in the decisionmaking process. Rather than entangling the schools in religion, the rules provide the means to ensure that the district steers clear of religious exercises."

[55] (Cert. Pet. A-71)

District Court expressly found that the "calm history" of the annual display of a creche was "marked by no apparent dissension".[56] In essence, the conclusion of the District Court was that although the nativity scene had never caused political debate in over 40 years, the political debate arising out of this lawsuit establishes a violation of the "excessive entanglements" principle. It is respectfully submitted that the Court of Appeals was correct in refusing to accept this portion of the District Court decision.

The complaint in this case was filed on December 17, 1980, and was accompanied by a motion for a temporary restraining order. By timing their legal action as they did and requesting a restraining order a few days before Christmas, these respondents caused a controversy which they now rely on as evidence of unconstitutionality. The political divisiveness shown on this record was caused not by sponsorship of the creche but by the bringing of this lawsuit at the height of the Christmas season. The District Court's conclusion as to the existence of political divisiveness prior to this legal action is obviously speculative and without evidentiary support in the record. The Court found that in none of the more than 40 years of the maintenance of the Christmas display prior to the institution of this legal action did any political dispute exist. It further found that the only controversy concerned this constitutional challenge. Nevertheless, the District Court concluded that the 40-year record of harmony merely disguised a subsurface dissension which appeared when the constitutional challenge was made.[57] It is submitted that the District Court's conclusion is contradictory of its own finding that the sponsorship of the Christmas celebration had a "track record" of community harmony. There is nothing in the record to support the conclusion that the City's incorporation of a creche in its Christmas display created political debate. What caused the political debate was the raising—one week before Christmas—

[56] (Cert. Pet. A-71)
[57] (Cert. Pet. A-71, A-72)

of the constitutional question that is before this Court. Clearly, political debate over constitutional questions, rather than being a sign of undesirable entanglement, is a healthy sign in a democracy. See *Lemon* v. *Kurtzman*, *supra*, 403, 622. The fact that the constitutional debate relates to the application of the Religion Clauses makes it no less an appropriate subject for political controversy.

Lemon v. *Kurtzman*, *supra*, dealt with the potential for political divisiveness in a new program which had no record of its political acceptability. However, in *Walz* v. *Tax Commission*, *supra*, this Court specifically had reference to the history of the practice of according tax exemptions to churches and from that history concluded that it was not productive of political divisiveness. In the case at bar, the City's Christmas display, with its creche, has been erected annually for over 40 years with a complete lack of political dissension. That is the only evidence in the record concerning the cause and effect between the sponsorship of the creche and its public acceptance. Accordingly, it is not necessary to examine the potential of the government action in this case to cause division along religious lines since the unbroken record of the City's action is that no such division did occur. When the division occurred, it was over the constitutional challenge to the City's action, and that, it is submitted, is not the political divisiveness which the third prong of the tri-partite test addresses.

As the Court of Appeals indicated, the District Court's finding as to the existence of political divisiveness—even if it were supported by evidence in the record—does not suffice to support its conclusion as to the existence of excessive entanglements. Political divisiveness is not in and of itself conclusive of a violation of the "excessive entanglements" portion of the tri-partite test. *Committee for Public Education* v. *Nyquist*, *supra*; *Lemon* v. *Kurtzman*, *supra*. It is only that political divisiveness which arises out of governmental involvement with religious activities or entities which produces the in-

firm constitutional conclusion. The real controversy shown by the evidence in this case was over the constitutionality of Christmas. Since government's involvement with Christmas is not a religious activity because of the dominant secular character of the Christmas holiday, then there is no religious relationship which would make material the existence of any political divisiveness. If the inclusion of a creche in a Christmas celebration rendered the government's sponsorship sufficiently religious in character to raise the danger of political divisiveness, then it would only be because Christmas itself is divisive because of its religious content.[58] The essential character of the City's sponsorship is legitimately secular and the nativity theme in the American Christmas tradition does not unconstitutionally infect the celebration of the national holiday.

[58] It is respectfully submitted that the analysis of Judge Campbell in his dissenting opinion is correct when he states: "In my opinion, the two most logically consistent positions are as follows: either Christmas itself, because of its inextricably intertwined religious roots, cannot constitutionally be a national holiday, in which case, displays of the type here in issue would also be unconstitutional; or else Christmas is constitutional, in which case all its relevant symbols, including those depicting the nativity, are likewise constitutional, *so long as displayed for the purpose of* announcing the holiday." (italics in original) (Cert. Pet. A-197)

Conclusion

For the reasons stated and upon the authorities cited, the judgment of the Court of Appeals should be reversed and the case should be remanded for entry of judgment in favor of the petitioners.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS LYNCH, et al.,

Petitioners,

—v.—

DANIEL DONNELLY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE RESPONDENTS

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STATEMENT OF THE CASE

This case challenges the City of Pawtucket's erection of a Nativity scene depicting the birth of Christ as part of the City's Christmas display located in downtown Pawtucket. The display is traditionally set up in Hodgson Park, an urban park area owned by the Slater Mill Association and located along the Blackstone River, approximately three hundred (300) feet from the Pawtucket City Hall. The display is designed by the City Maintenance Supervisor; it is erected, guarded, and dismantled by City employees; and it is wired for lighting by the City's electrician. J.A. 30, 32, 53, 62-63.

Within the display, and challenged here, is a life-sized creche, purchased by the City in 1973 at a cost of One Thousand, Three Hundred, Sixty-Five ($1,365.00) Dollars. The creche encompasses an area of approximately fourteen

(14) feet by ten (10) feet; it includes a stable approximately four and one-half (4-1/2) feet high, together with thirteen to fifteen figures ranging in height from one (1) foot to five (5) feet. The figures include a baby lying in a manger, arms outstretched, two angels, several animals, and several figures kneeling in a posture of worship. All figures are arranged in such a way that their attention is directed to the baby. J.A. 33, 52, 147; Pl. Ex. 1; App. Vol. I, 28-29.[1]

The Nativity scene is set up in the center of the westerly side of Hodgson Park, facing Roosevelt Avenue and directly across from the only two bus shelters located on that block. J.A. 59-60. Also located in various spots throughout the park are other Christmas decorations, not

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1. "J.A." citations are to the Joint Appendix filed with this Court. Other citations to the record before the Court of Appeals are to trial exhibits, with citations such as "Pl. Ex."; and to trial testimony contained in the appellate Appendix Volumes, cited as "App. Vol."

at issue here. These include Disney characters, Santa and his reindeer, a wishing well and a forty (40) foot Christmas tree. J.A. 47, 51. Two spotlights, lit from 5:15 P.M. to 10:30 P.M., are trained directly upon the Nativity scene; ten additional spotlights and numerous smaller lights illuminate the entire Hodgson Park area. The City reimburses the Slater Mill Association for the cost of this lighting. J.A. 43, 40, 59.

Normally, an initial lighting ceremony is the only public gathering that is held in Hodgson Park in concert with the City's Christmas display. However, in 1980, shortly after this suit was filed, the Mayor of the City, Dennis Lynch, held a press conference from a podium set up adjacent to the creche. J.A. 61. During this press conference, according to newspaper accounts introduced into evidence by respondents, the Mayor vowed to fight

the ACLU's attempt to take "Christ out of Christmas". He also walked through a group of children and passed the microphone among them so that they could lead in Christmas carolling. J.A. 94, 103; Pl. Ex. 12.

The Reverend Thomas Ramsbey, a minister of the Methodist church and the holder of a doctoral degree in the areas of social ethics and the sociology of religion, testified for respondents as to the nature of the creche as a religious symbol. Reverend Ramsbey distinguished "sacred" or religious symbols, which are identified closely with one group and which derive their meaning from that group, from "profane" or secular symbols, which are not identified with any particular group but rather "belong to everyone". App. Vol. III, 243. The Nativity scene displayed by the City of Pawtucket is, according to Reverend Ramsbey, plainly a religious

or sacred symbol, designed to make a statement concerning the Divinity of Christ. Id. As a basis for his opinion, Reverend Ramsbey cited the Nativity scene's origin in the New Testament, the worshipful posture of the component figures, and the inclusion of angels, which are "messengers from heaven". Id. at 244-45. Furthermore, the creche continues to be central to the Christian celebration of Christmas and is used by the Methodist Church in worship. Id. at 248, 262. In fact, Reverend Ramsbey testified that as "a very sacred religious symbol" the creche is demeaned by its placement amid secular Christmas symbols. Id. at 244, 252.

In response to Reverend Ramsbey's testimony, petitioners [hereafter sometimes "the City"] introduced testimony by Dr. David Freeman, a professor of philosophy at the University of Rhode Island. App. Vol. III, 284-86. Dr.

Freeman stressed the relationship between the setting in which a symbol appears and the nature of the viewers' reaction to that symbol. Although he testified that "a symbol in a non-religious context will not be a religious symbol and will not have a religious impact," Dr. Freeman agreed with Dr. Ramsbey that any viewer familiar with the New Testament would realize that the Nativity scene was designed to show homage to the Christ child. Id. at 297, 299.

Respondents also introduced expert testimony with regard to the impact of symbolism, such as the creche, upon children and adults. Dr. Michael Werle, a clinical psychologist, testified that during a certain part of their lives, symbols are especially important to children, and that the Nativity scene erected by the City functions as a particularly powerful symbol because of its religious dimensions

and because of the tremendous attraction that the entire Christmas display would possess for a child. J.A. 74-76. According to Dr. Werle, for a child whose family does not adopt the religious teachings expressed by the creche, that symbol, as part of a government sponsored display, will evoke conflict and confusion as to whether the child is truly a part of his country and family and whether he can be part of both. J.A. 76. In adults, publicly supported religious symbols, such as the creche, encourage pride approaching "religious chauvinism" in those who subscribe to the faith associated with the symbol. J.A. 76-77.

Mayor Lynch and two Pawtucket businessmen testified for the City as to the avowed purpose and effect of the City's inclusion of a creche in its Christmas display. The Mayor testified, in apparent contradiction, first that the creche is central to the

City's Christmas experience "for three basic reasons, cultural and tradition, aesthetically, and to the economic well-being of the community," and yet that he considered it "incidental and not the main thing of the Christmas display, not the primary reason". J.A. 92, 106. Myron Stoller, a retailer in downtown Pawtucket and President of the Pawtucket Plaza Associates, and Dennis Moore, Executive Director of Downtown Pawtucket Revitalization, Inc., both testified that, in their opinion, the principal impact of the City's Christmas display as a whole is to bring potential customers into the downtown Pawtucket area and that removal of the creche would in no way affect the commercial impact of the remainder of the display. J.A. 133, 135, 138, 139-40.

Finally, with regard to the divisiveness spawned by this issue, respondents in-

troduced as evidence letters to the editor which appeared in The Providence Journal and in The Pawtucket Evening Times, letters to Mayor Lynch from members of the public, and testimony by Mayor Lynch and Steven Brown, Executive Director of the Rhode Island affiliate of the ACLU. J.A. 151-67; Pl. Ex. 4, 11; App. Vol. II, 218. The District Court after reviewing these exhibits concluded that

> the Court is firmly convinced that they evidence a deep concern about and resentment for what most of the correspondents regard as an attack upon a cherished religious symbol. Although many letters criticized the ACLU as "petty," most writers did not mean that the creche was an insignificant part of the display. Indeed, the intensity of feelings evident in the letters belies any suggestion that the writers regarded this lawsuit as involving a trivial matter.... Overall the tenor of the correspondence is that the lawsuit represents an attack on the presence of religion as part of the community's life, an attempt to deny the majority the ability to express publically its beliefs in a desired and traditionally accepted way.

Donnelly v. Lynch, 525 F. Supp. 1150, 1161-62 (D.R.I. 1981).

After carefully reviewing the evidence before it, the District Court found that Christmas retains strong significance as a religious holiday and that the Nativity scene is primarily an embodiment of Christian beliefs concerning the birth and nature of Jesus Christ. The Court then applied the evidence, outlined above, to each element of the tri-partite Establishment Clause test first set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971), and found that the City's actions in erecting and maintaining a Nativity scene as part of its Christmas display violated each aspect of the test. In purpose, in effect, and in the entanglement evidenced by political divisiveness, the City failed to act in such a way as to remove its sponsorship and support of a religious symbol from the prohibitions of the Estab-

lishment Clause.

In its review of the District Court's decision, the United States Court of Appeals for the First Circuit [hereafter "Court of Appeals"] applied the Establishment Clause test set forth in Larson v. Valente, 456 U.S. 228 (1982), decided after the District Court had issued its opinion. In applying a test of strict scrutiny, the Court of Appeals held that the City's actions violated the Establishment Clause because the City had "established no compelling governmental interest in the erection of the Nativity scene." Donnelly v. Lynch, 691 F.2d 1029, 1035 (1st Cir. 1982). Alternatively, the Court affirmed the conclusions of the District Court that the City had failed to prove any legitimate secular purpose for including the creche within its display, and that its erection of the creche had the primary ef-

fect of advancing religion. Id. Consequently, under both the Larson and Lemon tests, the Court of Appeals affirmed the District Court's decision that the City's display of a Nativity scene as part of its annual Christmas display violates the Establishment Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment.

SUMMARY OF ARGUMENT

Petitioners' purchase and display of the Nativity scene -- paid for with public funds and given official government support -- violates the Establishment Clause in three fundamental ways: (1) by placing the imprimatur of the state on religious beliefs; (2) by discriminating among religious beliefs; and, most basically, (3) by failing to satisfy any, much less all, of the three purpose, effect, and entanglement tests used to determine the permissibility of government activity which assists religion.

1. The Nativity scene, which symbolically re-enacts a central event in Christian religious belief, is undeniably sectarian. In Stone v. Graham, 449 U.S. 39, 42 (1980), this Court held that "the mere posting" of the undeniably sectarian Ten Commandments by a governmental entity provided the official support of religion "that the Establishment Clause prohibits." Similarly, in Larkin v. Grendel's Den, 74 L.Ed.2d 297, 306 (1982), the Court struck down a statute which permitted churches to veto the grant of a liquor license within 500 feet of a church because the "mere appearance of a joint exercise" by Church and State constituted an impermissible symbolic affirmation of the favored status of religion. Official display of the Nativity scene here is far more sectarian than the mere posting of the Ten Commandments in Stone or of the zoning preference in Grendel's Den since the Nativity scene constitutes a state celebration and symbolic affirmation of the Divine nature of

the Christ child. Through the City's display of the Nativity scene, the state has unconstitutionally placed its imprimatur on religious belief.

2. Not only does the Establishment Clause bar placing the imprimatur of the state on religion in general, but it also "mandates governmental neutrality between religion and religion." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). It accordingly is constitutionally impermissible to discriminate among religions generally by disfavoring less established religions, Larson v. Valente, 456 U.S. 228 (1982), and it is similarly discriminatory to give favored status to a majority religion such as Christianity through governmental support of Bible teaching, School District of Abington Township v. Schempp, 374 U.S. 203 (1963). Whether the City of Pawtucket's display of the Nativity scene is viewed as favoring the Christian religion of

the majority of Pawtucket's residents, or whether the government support of Christian beliefs is viewed as discriminating against all other religions, the City's activity violates the neutrality mandate of the Establishment Clause.

3. Most basically, the City's display of an overtly religious symbol violates the Establishment Clause's ban on governmental activity favoring religion since the City's activity satisfies none of the three tests set forth in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

a. First, although the City must establish that its display and support of religious belief has a secular purpose, the record here instead compels the conclusion that the very purpose of the Nativity scene is religious. In fact, one of the primary reasons for the City's maintenance of the Nativity scene is to "keep Christ in Christmas." 525 F. Supp. at 1173, 1180.

b. Second, although the City must establish that its governmental support of Christianity does not have the primary effect of advancing religion, the record here again compels the conclusion that the effect of the City's display of the Nativity scene -- on adults and particularly on impressionable children -- is instead the advancement of Christian religion.

c. Third, although the City's activity may not foster an entanglement between government and religion, the very fact of a government's choosing to display the symbols of one religion and thereafter possibly of another religion, J.A. 104, invokes precisely the "competition among religious sects for political and religious supremacy" which the Establishment Clause guards against. Committee for Public Education v. Nyquist, 413 U.S. 756, 796 (1973). Given the divisiveness evident in Pawtucket, the record here reveals impermissible excessive entanglement.

In sum, whether viewed as placing the imprimatur of the state on a sectarian belief as in Stone v. Graham, 449 U.S. 39 (1980), as subject to the strict scrutiny test applied in discriminatory contexts such as in Larson v. Valente, 456 U.S. 228 (1982), or under the traditional three-part test of Lemon v. Kurtzman, 403 U.S. 602 (1971), the expenditure of public funds to purchase, maintain and display the sectarian religious symbol of a Nativity scene does not withstand Establishment Clause analysis.

ARGUMENT

This case, which challenges the expenditure of public funds to erect and maintain a Nativity scene in downtown Pawtucket, Rhode Island as part of the City's annual Christmas display, presents an unfortunate conflict between two understandable human concerns.

On one hand is the wish of many residents of Pawtucket to celebrate their Christian religious heritage by symbolically depicting the birth of Christ through the display of a Nativity scene. Not surprisingly, the religious majority is vigorously championed by Pawtucket's chief elected official, Mayor Dennis Lynch, who has vowed "to keep Christ in Christmas" by continuing to display the City's creche.

On the other hand are the legitimate concerns of those, including many devout individuals, who believe that government should not celebrate the religious beliefs of any group and who feel that by choosing to expend public funds to display a religious tableau representing the Divinity of the Christ child, the City of Pawtucket has placed its imprimatur on a set of religious beliefs in violation of the Establishment Clause of the First Amendment.

The precise issue, therefore, is not whether citizens of Pawtucket may display a creche, or even whether a privately erected and maintained creche may be displayed in a public forum, but solely whether the government of Pawtucket may single out a religious symbol and erect it at public expense in celebration of the religious views of the majority.

To many, the dispute may appear trivial. After all, the sums involved are small and the religious symbolism familiar. However, on both a practical and a principled level, the dispute raises the significant issue of the extent to which a religious majority may use the mechanism of government to celebrate and reinforce religous dogma. On a practical level, a child whose family does not believe in the Divinity of Christ must view the public creche as a symbolic representation of his or her status as an outsider,

not only at the level of religion, but at the political level as well. On a principled level, the practice is flatly contrary to the goal of the Establishment Clause which is to divorce religion from government. The Founders recognized that faith is a potent motivating force which has often led believers to enlist the power of the state in the propagation of religious "truth". Pawtucket has chosen to enlist the power of the state to celebrate an appealing and widely shared aspect of Christian dogma. However, if Pawtucket may engage the state in the celebration of a widely shared Christian religious belief, no principled basis exists to prevent all religious groups from seeking to use the state to further their sincerely felt religious ends. The result would be precisely the confusion of religious

dogma and political power which the Establishment Clause sought to preclude.

It is, of course, wholly appropriate for those residents of Pawtucket who wish to do so to band together and to display religious symbols in celebration of their beliefs. The sole issue raised by this case is whether the City of Pawtucket may be used as the vehicle through which such a religous observance takes place.

I. THE ERECTION AND DISPLAY OF A PUBLIC CRECHE PLACES THE IMPRIMATUR OF THE STATE ON A SET OF RELIGIOUS BELIEFS IN VIOLATION OF THE ESTABLISHMENT CLAUSE

A. The Display Places the Government's Imprimatur on a Religious Symbol

Pawtucket's creche depicts the miraculous birth of Jesus to Joseph and the Virgin Mary in a manger in Bethlehem. It symbolically re-enacts a central event in Christian religious belief.

There is, of course, nothing pernicious

about celebrating the birth of Christ. However, by choosing to expend public funds on the purchase, erection and display of such an avowedly sectarian symbol, Pawtucket has placed the imprimatur of the government on a "plainly religious" belief in flat disregard of the Establishment Clause.

In Stone v. Graham, 449 U.S. 39 (1980) (per curiam), the Court was confronted with a statute directing that the Ten Commandments be displayed in Kentucky's public school classrooms. Recognizing the "plainly religious" nature of the Ten Commandments, this Court held that such a symbolic display violated the Establishment Clause because "the mere posting of the copies under the auspices of the legislature provides the 'official support of the state ... government' that the Establishment Clause prohibits." 449 U.S. at 42.

Similarly, in Larkin v. Grendel's Den, ___ U.S. ___, 74 L.Ed.2d 297 (1982), the

Court struck down a Massachusetts statute which permitted churches to veto the grant of a liquor license within 500 feet of a church because the "mere appearance of a joint exercise of legislative authority by Church and State" constituted an impermissible symbolic affirmation of the favored status of religion. 74 L.Ed.2d at 306.

The official display of the sectarian religious symbol at issue in this case is more clearly violative of the Establishment Clause than the symbolic manifestations struck down in Stone v. Graham and Larkin v. Grendel's Den. One need not believe in the Divinity of Christ to appreciate the wisdom of the Ten Commandments, and one need not hold any religious belief at all to appreciate the desire of a congregation to worship free from distractions incident to the sale of liquor. Yet, in Stone, this Court recognized that the display of the Ten Commandments in public schools consti-

tuted a symbolic state affirmation of the religious creed which is recited in the Commandments themselves.[2] And in Grendel's Den, this Court recognized that delegating legislative power to churches constituted an impermissible signal that religion occupied a favored place in the eyes of the state.

The Nativity scene at issue in this case is far more sectarian than the Ten Commandments in Stone or the zoning power in Grendel's Den. It constitutes, not merely an affirmation of religion generally as in Grendel's Den, or an affirmation of

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2. "The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20: 12-17; Deuteronomy 5:16-21. Rather, the first part of the Commandments concerns the religious duties of believers; worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20:1-11; Deuteronomy 5:6-15." Stone v. Graham, 449 U.S. at 41-42.

of the Judeo-Christian ethic as in Stone v. Graham, but a celebration of Christian dogma and the symbolic affirmation of the Divine nature of the Christ child.

This Court has frequently noted that we live by symbols.[3] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); see also Spence v. Washington, 418 U.S. 405 (1974); Stromberg v. California, 283 U.S. 359 (1931). The "short cut from mind to mind", Barnette, 319 U.S. at 632, which Pawtucket fosters by its display of religious symbolism is an obvious one. It is a celebration of the common religious

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3. Justice Jackson, speaking for the Court in Barnette noted: "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.... The State announces rank, function and authority through crowns and maces, uniforms and black robes; the Church speaks through the Cross, the Crucifix, the alter and shrine, and clerical raiment." 319 U.S. at 632 (emphasis added).

heritage shared by Pawtucket's Christian majority and an affirmation of the importance which that heritage plays in the political and social life of the community. There could not be a clearer violation of the Establishment Clause's minimal guaranty of religious neutrality.

Petitioners seek to defend the public display of the Nativity scene by arguing, first, that it no longer conveys a religious message and, second, that such displays are merely an acceptable acknowledgment of our Christian religious heritage. To suggest that a creche does not convey a religious message is to blink at reality. Whatever the ostensible purpose of the display, its religious meaning cannot be negated. It is nothing less than a symbolic restatement of a central tenet of the Christian faith, the miraculous birth of a Divine Savior. Nor can the

display be defended as a mere acknowledgment of our religious heritage. Expending public funds to erect and maintain an avowedly sectarian symbol is far more than acknowledgment; it is support and reinforcement. It is one thing to argue that government may acknowledge our religious heritage by permitting private persons to display religious, as well as political, symbols on public property which has been set aside as a public forum. Cf. Widmar v. Vincent, 454 U.S. 263 (1981). It is quite another to argue that government may "acknowledge" our religious heritage by expending public funds to endorse a sectarian belief.

B. The Nativity Scene is a Religious, Not a Secular, Symbol

Petitioner argues that the presence of the Nativity scene as a part of an otherwise secular Christmas display insulates its overtly religious nature from

Establishment Clause scrutiny. This argument misconstrues and wholly undermines the meaning of the Establishment Clause.

In considering whether the creche retains an independent identity as a religious symbol, it is useful to recall, in Establishment Clause terms, what is meant by religion. In Davis v. Beason, 133 U.S. 333, 342 (1890),[4] the Court observed:

> The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.

The Nativity scene displayed by the City

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4. See also McGowan v. Maryland, 366 U.S. 420, 465-466 (1961)(separate opinion of Frankfurter, J.): "The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehsnive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief."

of Pawtucket expresses, symbolically, the Christian view of man's relationship to Jesus Christ and of reverence to the Divinity of Christ.[5] Far from representing, as the City claims, merely an element of folk tradition and Christmas art, the Nativity scene tells a story, and that story comes neither from folklore nor from history, but from the New Testament of the Bible. Matthew 2:9-11; Luke 2:7-16. As the District Court noted:

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5. The Nativity scene is described in the District Court's opinion as follows: "The figures in the nativity scene are approximately life-sized.... They include kings bearing gifts, shepherds, animals, angels, and Mary and Joseph kneeling near the manger in which the baby lies with arms in apparent benediction. All of the figures face the manger in which the baby lies; several have their hands folded and/or are kneeling. The figures' poses, coupled with their facial expressions, connote an atmosphere of devotion, worship and awe." Donnelly v. Lynch, 525 F. Supp. 1150, 1156 (D.R.I. 1981).

Dr. Ramsbey, an expert in the sociology of religion and an ordained Methodist minister, likewise testified that "the whole setting of the creche is a statement about the divinity if you will or the extraordinariness of the birth of this baby Jesus. It is no ordinary baby and that's very clear from the symbols that are there." J.A. 118; see also 525 F. Supp. at 1160.

> the Court does not understand what meaning the creche, as a symbol, can have other than religious meaning. It depicts the birth of Christ in a way that is not merely historical. It has not been so altered over the years as to relegate its religious connection to a matter of historical curiosity. It is the embodiment of the Christian view of the present nature of Christ. Unless that view has itself lost its religious significance, an artifact that portrays that view simply and unambiguously cannot be other than religious.

Donnelly v. Lynch, 525 F. Supp. 1150, 1167 (D.R.I. 1981).

Although the present-day Nativity scene retains its faithfulness to biblical teachings and to the religious aspect of Christmas vital to Christians, the City argues, in essence, that its actions escape Establishment Clause scrutiny because it erects the Nativity scene along with many secular Christmas symbols. Consequently, it argues, the Nativity scene is inseparable from those

secular symbols. Brief of Petitioners at 17.

This Court, however, has consistently recognized that the religious and the secular may co-exist in the same setting without either losing its separate identity. Indeed, much of this Court's jurisprudence as to the propriety of state aid to parochial schools is premised on an ability to distinguish between secular and religious activities taking place in the same geographical setting. See generally Committee for Public Education v. Regan, 444 U.S. 646 (1980); Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236 (1968).

Although the type of state aid in the parochial school cases is very different from the City of Pawtucket's sponsorship of a Nativity scene, the Court's recog-

nition of the segregability of secular and religious functions is controlling.[6]

The second "context" argument which the City advances relates to the context of Christmas itself, which the City asserts has assumed an independent and dominant secular character. Brief of Petitioners at 16-21. The City cites, in support of its contention, the Court's decision in McGowan v. Maryland, 366 U.S. 420 (1961), which upheld the constitutionality of Maryland's Sunday closing laws. In so ruling, the Court relied on several factors which differ from the issue here. First, and most importantly, respondents do not challenge the constitutionality of declaring Christmas a national or state

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6. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." Hunt v. McNair, 413 U.S. 734, 743 (1973)(emphasis added).

holiday. Nor do respondents challenge the constitutionality of a publicly funded Christmas display. Rather, respondents challenge only the City's ownership, erection and display of an avowedly sectarian Nativity scene. Thus, any analogy between the secularization of Sunday as a day of rest and Christmas as a national holiday falls substantially short of providing an answer to the question before the Court. Furthermore, in concluding that Maryland's Sunday closing laws, although religious in origin, had become secularized, the McGowan Court relied heavily on similar legislation in effect at the passage of the First Amendment, the centuries old tradition of Sunday as a day of rest, the legitimacy of the state's purpose of promoting one day of rest for all citizens, and the impracticability of substituting another day of the week for Sunday as a day

of rest. None of these factors is present here. The lower court decisions in this case have neither prevented the declaration of Christmas as a national or a state holiday, nor prevented the City from erecting a secular Christmas display. No overriding secular purpose has been advanced by the City for inclusion within its display of a Nativity scene which remains a religious symbol.[7] No centuries old tradition of sponsorship of Nativity scenes throughout the United States is alleged. In short, the issue before this Court is so far removed from the facts and rationale of McGowan v. Maryland as to render that decision of little relevance here.

Finally, it must be noted that the trial court, after listening to the evidence with regard to the religious nature

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7. Indeed, two witnesses for the City testified that the commercial purposes served by the City's Christmas display would be equally well served if the Nativity scene were absent. J.A. 135, 139-40.

of Christmas and of the Nativity scene, made a factual finding, approved by the Court of Appeals, that "Christmas remains a major spiritual feast day for most sects of Christians. It has not lost its religious significance; rather, it has gained a secular significance." Donnelly v. Lynch, 525 F. Supp. 1150, 1163 (D.R.I. 1981).

Thus, the fact that Christmas itself may also have a secular aspect cannot insulate sectarian government actions surrounding Christmas from Establishment Clause strictures.

C. No Historical Exemption Shields Petitioners' Activity From Establishment Clause Scrutiny

Whether viewed as placing the imprimatur of the state on a sectarian belief as in Stone v. Graham, 449 U.S. 39 (1980), or under the traditional three-part test of Lemon v. Kurtzman, 403 U.S. 602 (1971), or the "strict scrutiny" test suggested by

Larson v. Valente, 456 U.S. 228 (1982), the expenditure of public funds to purchase, erect and maintain a sectarian religious symbol cannot withstand doctrinal analysis. Unlike the legislative chaplaincy at issue in Marsh v. Chambers, ___ U.S. ___, 51 U.S.L.W. 5162 (July 5, 1983), no historical exception can be utilized to shield the practice from doctrinal scrutiny. In Marsh, the Brief Amicus Curiae submitted by the United States pointed out repeated instances of the toleration of paid legislative chaplains by the Founders. However, as the Brief Amicus Curiae submitted by the Solicitor General in this case reveals, no similar historical evidence may be marshalled in favor of a practice of publicly-funded sectarian religious displays. What historical evidence is presented in the Solicitor General's brief is designed to demonstrate merely that the Founders were religious men who would not have wished the nation to deny its religious heritage. One need not quarrel with such a conclusion to affirm the decision below. For, in marked

contrast to the wealth of historical documentation presented in Marsh, the Solicitor General's current Brief cannot point to a single instance in which the Founders countenanced the use of public funds to erect avowedly sectarian religious symbols at Christmas time or at any other time.[8] One can hardly

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8. Instead of historical detail, the Solicitor General cites to general passages from Story's Commentaries on the Constitution of the United States. Brief Amicus Curiae of the United States at 6, 10. One can, however, hardly accept as persuasive authority a text which contends that the "real object" of the Establishment Clause "was, not to countenance, much less to advance Mahometanism, Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects." 1 Story § 1871, quoted in Marsh v. Chambers, ___ U.S. ___, 51 U.S.L.W. 5162, 5171 (July 5, 1983) (Brennan, J., dissenting).

assume that a President who issued proclamations calling on Americans to engage in Christian prayer [9] would have stinted at publicly funded sectarian symbols unless he understood the practice to have violated the Establishment Clause.

II. THE PUBLIC PURCHASE, ERECTION AND DISPLAY OF A CHRISTIAN RELIGIOUS SYMBOL CONSTITUTES A FORBIDDEN DISCRIMINATION AMONG RELIGIOUS BELIEFS IN VIOLATION OF LARSON V. VALENTE

The Establishment Clause sounds two basic themes. First, it places strict limits on the extent to which government may assist religion generally. E.g. Lemon v. Kurtzman, 403 U.S. 602 (1971). Second, it places even stricter limits on the extent to which government may favor one religious belief over another. Larson v. Valente,

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9. President John Adams issued a number of such proclamations during his Presidency. See Pfeffer, Church, State, and Freedom, 266 (rev. ed. 1967); 3 A.Stokes, Church and State in the United States, 513 (1950).

456 U.S. 228 (1982). As respondents will demonstrate infra in point III, the governmental display of an avowedly religious symbol violates the ban on aid to religion generally; however, as the First Circuit correctly noted below, Pawtucket's creche violates the irreducible core of the Establishment Clause by officially preferring Christian religious beliefs over those of other religions.

In Larson v. Valente, 456 U.S. 228 (1982), this Court invalidated a statute which, on its face, provided for differential treatment of denominational groups. The Court noted that

> when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.

456 U.S. at 246.

Pawtucket's purchase and display of a religious symbol constitutes a governmental "denominational preference" since it celebrates

the doctrinal beliefs of those who embrace the Divinity of Jesus Christ.[10] Thus, applying the teaching of Larson, the First Circuit invalidated the practice because it failed to advance a "compelling governmental interest" by means which are "closely fitted to further that interest". Donnelly v. Lynch, 691 F.2d 1029, 1034-35 (1st Cir. 1982).

The concept that the First Amendment mandates religious neutrality on the part of government did not originate with this Court's decision in Larson. It underlies virtually the entire Establishment Clause jurisprudence of this Court. As the Court noted in Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968):

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10. The District Court noted that "the only religious heritage and traditions that have been part of Pawtucket's official ceremonies and displays are those of the Christian majority of its citizenry.... [I]f the majority's religious heritage and customs are the only ones that, in the end, are 'acknowledged,' the asserted neutral purpose is cast into some doubt." Donnelly v. Lynch, 525 F.Supp 1150, 1172 (D.R.I. 1981).

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

Thus, whenever this Court has upheld a degree of state assistance to religious activity, it has explicitly noted that the state assistance was available to all religious groups equally and was merely an analogue of similar assistance offered to secular activities. E.g. Everson v. Board of Education, 330 U.S. 1 (1947) (transportation of non-public as well as public school students); Zorach v. Clauson, 343 U.S. 306 (1952) (released time for religious instruction);

Walz v. Tax Comm'n, 397 U.S. 664 (1970) (property tax exemptions for religious and non-religious property); Roemer v. Board of Public Works, 426 U.S. 736 (1976) (grants to all private colleges); Mueller v. Allen, ___U.S.___, 51 U.S.L.W. 5050 (June 29, 1983) (income tax deductions for parents of private and public school students).

Conversely, whenever state assistance has favored one religion over another, or has favored religion over secular activities, this Court has uniformly invalidated the practice. Thus, in School District of Abington Township v. Schempp, 374 U.S. 203 (1963), the Court invalidated Bible reading in the public schools, noting:

> **The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or**

> dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits.

Id. at 222.[11]

Similarly, in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), reaffirmed last Term in Mueller, the Court invalidated tax credits for private school tuition because they provided a "special" tax benefit available only to parents of children attending overwhelmingly parochial private schools.

Finally, in Larson v. Valente, 456 U.S. 228 (1982), the Court reviewed the doctrine of neutrality set forth in Everson, Zorach, Epperson, and Schempp and concluded that

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11. The Court in Schempp dispensed with the charge that forbidding Bible reading in the public schools would constitute hostility to religion. Hostility will result, noted the Court, only if the state affirmatively opposed or demonstrated hostility toward religion.

when the state acts preferentially towards certain religions, its actions are subject to strict scrutiny, the standard routinely applied when basic freedoms are infringed by governmental action. In Larson, the challenged statute exempted from detailed registration and reporting requirements imposed upon charitable organizations, those religious organizations which received more than half their contributions from members or from affiliated groups. Because the statute discriminated on its face among religious organizations, the Court held the state to proof, not merely of secular legislative purpose, but of a compelling governmental interest.

The testimony and documentary evidence presented to the District Court demonstrates that by its erection and impassioned defense of the Nativity scene, the City and its officials sponsored not merely religion

generally, but the Christian religion in particular. Although Mayor Lynch testified that the City participated in other holiday celebrations comparable to Christmas, the only holidays he cited were July 4, Memorial Day, and Veteran's Day, all of which are national patriotic holidays not connected with religion. J.A. 110, 114. Furthermore, Mayor Lynch testified that the elimination of the Nativity scene was "a step towards establishing another religion, non-religion, though it may be." J.A. 100. Accepting the Mayor's testimony, one can then infer that he also believes the converse -- that inclusion of the Nativity scene in the City's display is intended to establish the Christian religion.

In addition to the testimony of Mayor Lynch and to the actions of the City, there in any event is no question that most of the residents who wrote to the Mayor and to the

local newspapers concurred in the view of the creche as a Christian symbol.[12]

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12. "Let's take our hats off to our courageous and outspoken Mayor, Dennis M. Lynch, who has come to the defense of all Christians in the controversial crib scene." "Let's gather around the crib." The Evening Times (Dec. 27, 1980). J.A. 151.

"Choice greatings in Christ's name.... I only regret that the ACLU and all the lands do not recognize the fact that this nation was founded upon Christianity. It was founded upon Jesus Christ." Letter from the Trinity Assembly of God. J.A. 157.

"May 'God' bless you in your efforts to keep 'Christ' in Christmas." Letter to Mayor Lynch. J.A. 161.

"Mayor Lynch, I don't speak out about many issues but when a handful of cold blooded atheists strike out at my God, I see red. My family and I are Roman Catholics." Letter to Mayor Lynch. J.A. 163.

In light of these facts, it is evident that the creche is a unique form of City sponsorship of religious symbolism, and, at least partly as a result of its unique status, is commonly accepted as indicative of official support for the religion of the majority.[13] Thus, the City's actions must be classified not as affording a uniform benefit to all religions, but rather as discriminating "among religions" within the meaning of Larson v. Valente. Because the city has failed to advance any legitimate secular purpose -- much less a compelling one -- for its erection and support of a religious symbol, its actions cannot rise to the level of a compelling governmental interest and are therefore invalid.

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13. The Mayor's testimony that he would like to erect a Menorah in the future underscores the accessibility to the City of Judeo-Christian beliefs as opposed to innumerable less popular sects. The Mayor noted that at least part of the reason given for City's proposed sponsorship of a Menorah was to thank the "Jewish bretheren" who supported the City's fight to maintain the Nativity scene. J.A. 104.

III. THE PURCHASE, ERECTION AND MAINTENANCE OF AN OVERTLY RELIGIOUS SYMBOL BY THE CITY OF PAWTUCKET VIOLATES THE ESTABLISHMENT CLAUSE BECAUSE IT (A) DOES NOT ADVANCE A SECULAR PURPOSE; (B) HAS THE PRIMARY EFFECT OF ADVANCING RELIGION; AND (C) FOSTERS AN EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION

Respondents have demonstrated in Point II that, viewed as a symbolic affirmation of Christian religious belief, Pawtucket's creche constitutes an impermissible discrimination in favor of one sectarian creed. The governmental display of an overtly religious symbol violates as well a second aspect of the Establishment Clause -- the ban on government activity favoring religion as opposed to non-religion. The Court has articulated a familiar three-part test to determine when government activity which assists religion

satisfies the Establishment Clause. Lemon v. Kurtzman, 403 U.S. 602, 612-13, (1971). First, the activity must have a secular purpose;[14] second, the activity may not have the primary effect of advancing religion;[15] and, third, the activity may not foster an excessive entanglement between government and religion.[16] Pawtucket's decision to expend public funds to display a symbolic affirmation of the Divinity of Christ fails to satisfy each of the Lemon criteria.

A. Pawtucket's Expenditure of Public Funds to Purchase and Display a Symbolic Re-enactment of the New Testament's Version of the Birth of the Christ Child Does Not Advance a Secular Purpose

14. See Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Epperson v. Arkansas, 393 U.S. 97 (1968).

15. Compare Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), with Mueller v. Allen, ___ U.S. ___, 51 U.S.L.W. 5050 (June 29, 1983).

16. Compare Lemon v. Kurtzman, 403 U.S. 602 (1971), with Tilton v. Richardson, 403 U.S. 672 (1971).

The case closest in point to this case is Stone v. Graham, 449 U.S. 39 (1980) (per curiam). There the Court held that the obvious secular significance of the rules of conduct set forth in the Ten Commandments could not obscure their essentially religious nature. Accordingly, the Court ruled that the display of the Ten Commandments on the walls of Kentucky public school classrooms did not advance a secular purpose within the meaning of Lemon. As with the Ten Commandments, Pawtucket's creche has an obvious and well understood doctrinal meaning. Its display is no different than the display of the Ten Commandments in Stone.

Similarly, in School District of Abington Township v. Schempp, 374 U.S. 203 (1963), this Court rejected an argument that reading from the Bible advanced significant secular ends. Just as the Abington Court recognized

the essentially religious nature of the Bible, so the Courts below each recognized the inherently religious nature of the Nativity scene in the context of this case.

Petitioners argue that the basic fallacy in the Court of Appeals and District Court decisions lies in their isolated treatment of the creche as a dominantly religious symbol. "On the record in this case...the City is not sponsoring a creche, but rather is sponsoring a Christmas celebration, a small portion of which includes a creche." Brief of Petitioners at 25. They assert that the contextual purpose of the creche is the advancement of the holiday tradition, the promotion of the central city area as an attraction for the general public, and the promotion of "retail activity during the Christmas season." Brief of Petitioners at 29. These purposes articulated by Petitioners belie the true motivation -- as found by the Courts below -- for

the use of the creche.

First, as the District Court found, the Nativity scene, unlike every other element in the display at Hodgson Park, "appears neither to have been divorced from [its] religious origin nor deprived of [its] centrally religious character by the passage of time." Donnelly v. Lynch, 525 F.Supp. 1150, 1170 (D.R.I. 1981), quoting from School District of Abington Township v. Schempp, 374 U.S. at 278 (Brennan, J. concurring).

Second, respondents introduced, without objection, testimony and newspaper accounts of a press conference, held by Mayor Lynch at the site of the creche shortly after suit was filed, during which the Mayor led a group of children in Christmas carolling and vowed to fight attempts to take Christ out of Christmas. 525 F.Supp. at 1173, 1180.

In light of the evidence before it, the District Court concluded that

> the purpose of including a nativity scene in the Hodgson Park display was not merely the neutral recognition that Christmas possesses a religious significance for some people. Rather, Pawtucket's use of a patently religious symbol raises an inference that the City approved and intended to promote the theological message that the symbol conveys. In the Court's view, nothing in the record undermines the reasonableness of drawing that inference here. Indeed, several statements and actions of the City and the Mayor support it.

Id. at 1172. The District Court similarly noted that the City had made no attempt to disclaim endorsement of the religious statement presented by the creche; that the City's avowed purpose of acknowledging religious heritage and traditions through City ceremonies is discredited by its inclusion of only a Christian symbol in its display; and

that the City's insistence that Christ be kept in Christmas evidences a religious, not a secular, orientation. Id. at 1170-74.[17]

To suggest, as do petitioners, that the figures in the creche do no more to advance the City's purpose than do the figures of Santa Claus and reindeer, is to ignore the non-theological meaning of the latter and the religious origin and the continued theological message about the nature of the Child whose birth is depicted in the

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17. Under well established principles, the District Court's factual findings as to lack of a secular purpose may not be disturbed unless "clearly erroneous." Fed. R. Civ. P. 52(a).

former.[18] Perhaps the District Court's observations best summarize the purpose of the inclusion of the Nativity scene in the Hodgson Park display:

> In the Court's view, the City has accepted and implemented the view of its predominantly Christian citizens that it is a "good thing" to have a creche in a Christmas display, see (II, 60,67-68) (Mayor's testimony), because it is a good thing to "keep Christ in Christmas".

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18. There are, of course, many symbols which may once have communicated a religious meaning similar to the religious message the Nativity scene transmits today, but which have been so secularized as to have lost religious significance. The rote chanting of "God Save This Honorable Court" by a secular court employee; the use of "In God We Trust" as a motto; the inclusion of "Under God" in the Pledge of Allegiance are examples. Unlike Pawtucket's creche, they are rote non-denominational acknowledgments of our monotheistic heritage, rather than a celebration of one sectarian creed. Moreover, they are uttered in wholly secular circumstances. The display of a tableau designed to celebrate the birth of a Divine Savior in connection with the celebration of His birth hardly qualifies as a rote secular symbol which merely acknowledges a religious heritage.

> Irrespective of all the excellent religious reasons that may lead private individuals and organizations and religious institutions to embark on such a crusade, there is no independent secular justification for government's doing so. The Court concludes that the inclusion of the creche in the Hodgson Park display was not prompted by the "clearly secular purpose" that the Lemon test requires. Rather, the nativity scene was made part of the display in order to express the City's approval and endorsement of the religious message that the symbol conveys.

Id. at 1173-74 (footnote omitted).

B. The Primary Effect of Pawtucket's Decision to Display a Creche at Public Expense is to Advance the Christian Religion

This Court has stated that the Establishment Clause encompasses within its reach not only the official establishment of religion but also the "sponsorship, financial

support, and active involvement of the sovereign in religious activity." Committee for Public Education v. Nyquist, 413 U.S. 756 772 (1973), quoting from Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) (emphasis added).

Apparent sponsorship of a religious message results in majority sects being preferred while other sects whose beliefs are less favored suffer commensurate discrimination. Roemer v. Board of Public Works, 426 U.S. 736, 747-48 (1976). "So long as the subject matter of the exercise is sectarian in character, these consequences cannot be avoided." School District of Abington Township v. Schempp, 374 U.S. 203, 283 (1963).

Petitioners argue that only where the religious effect is a primary consequence of governmental behavior will the purpose and effect test be violated. Brief of Petitioners at 33. They assert that the

primary purpose and effect of the City's inclusion in its display of the creche is to celebrate a national holiday and that "the effect of the creche is no more primarily promotional of religion than is the legalization of the holiday." Brief of Petitioners at 34.

Just as in McGowan, there may be ample secular justification for Congress establishing Christmas as a national holiday. But that is not the issue before the Court, and the City's bootstrap argument accordingly must fail. The challenged action does not bestow a "remote" and "incidental" effect advantageous to religion. McGowan v. Maryland, 366 U.S. 420, 449 (1961). To the contrary, the City's erection of the creche has a real and substantial purpose and effect of associating the City with the Christian beliefs that the Nativity scene so dramatically represents. To suggest that the

inclusion of the creche does not have a primary religious effect because it is merely a component of the City's secular Christmas observance does not mute the religious message of the creche. As the District Court found:

> The Court disagrees that the secular context in which the creche is viewed is as neutralizing as the City's argument suggests. The secular and religious aspects of Christmas co-exist comfortably. Thus, when the City commingles secular and religious symbols in the display, it simultaneously evokes both dimensions of Christmas. Santa Claus is not rendered religious by its proximity to the creche the creche is not rendered secular by its proximity to Santa Claus. In fact, by displaying the nativity scene in a setting with Christmas trees, bright lights, Christmas carols, and other Christmas symbols, the City has placed the creche in a setting <u>supportive</u> of its meaning.

Donnelly v. Lynch, 525 F. Supp. 1150, 1177 (D.R.I. 1981) (emphasis in original).

People who view the display in Hodgson Park are not likely to regard the Nativity scene as a mere acknowledgment of a holiday symbol. The City has done nothing to attempt to eliminate the appearance of approval of and affiliation with the Christian view of Christmas. For even if, as the City insists, the creche does promote the goals of peace, charity and goodwill, there is the appearance of official sponsorship of Christian belief which confers more than a remote and incidental benefit on those of the Christian faith.

Respondents introduced significant documentation, as well as expert testimony, that many people viewed the City's display of the Nativity scene as well as the City's actions in support of that display as supportive of the doctrines of Christianity.

As respondents have already noted, many of those who telephoned or wrote to Steven Brown, Mayor Lynch, or the local newspapers applauded the City's support of the religious views of the majority. Dr. Michael Werle, an expert witness in the area of clinical psychology, testified concerning the effect of the Nativity scene and the City's actions in support of that scene on viewers, and particularly on children. According to Dr. Werle, the Christmas display erected by the City of Pawtucket in Hodgson Park would be "absolutely seductive to the interest of a child." J.A. 80. The child's perception of the display will be sharpened, and "the child will notice every part of it and will remember it for a long time, particularly if that child is three, four or five years of age. It will make indelible impressions." Id.

Dr. Werle further testified that for the child who belongs to a non-Christian family, seeing a Nativity scene as part of a City-sponsored Christmas display will raise "profound questions for that child insofar as whether or not he is okay or more importantly and as part of that whether his parents are okay." J.A. 76. The child will question, because of the setting in which the Nativity scene occurs, his identification with the American culture. For Christian adults, Dr. Werle testified that the government sponsorship of a Nativity scene

> encourages a religious chauvinism. For an adult to see such a symbol reinforces an already prevalent attitude in our country that we are a Christian country. We recently heard that on the radio that we are a Christian country and it is only a step from there to believing that therefore other religions and people

> who are of other persuasions are somewhat less important and have less merit so it encourages people who already confuse being an American with being Christian. It makes that confusion more difficult for them to see.

J.A. 76-77

The record compels a conclusion that the City's actions confer more than a remote or incidental benefit on a particular religion. To hold otherwise would require a disregard for the evidence and a contravention of established law.[19]

C. The Actions of the City and of its Officials Have Resulted in Excessive Government Entanglement with Religion

Although its roots can be identified in earlier cases, the "excessive entanglement"

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19. Nor may petitioners argue that government-sponsored religious symbols are forbidden only in public schools, but not public parks. Brief of Petitioners at 35. Especially where, as here, the sectarian display is largely aimed at children, the difference between the government's use of sectarian religious symbolism in schools as opposed to parks is of no legal signigicance.

test was first explicitly articulated in Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). The following Term, the Court made it clear in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), that "excessive entanglement" was a hurdle separate from and additional to the purpose and effect tests.

In Lemon, the Court was confronted with challenges to Rhode Island and Pennsylvania statutes that provided "state aid to church-related elementary and secondary schools." 403 U.S. at 606. In ruling that the statutes in question violated the Establishment Clause, the Court concluded that the state aid, "carefully conditioned...with pervasive restrictions," would require "comprehensive, discriminating, and continuing state surveillance" to insure that the legislature's restrictions were obeyed. This surveillance would involve an "excessive

and enduring entanglement between state and church." 403 U.S. at 619.

The Court next considered what it termed a "broader base of entanglement": the divisive political potential "of these state programs." Id. at 622. Reflecting the wisdom of Justice Harlan in his separate concurrence in Walz and the oft-cited commentary by Professor Freund, the Court observed:

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.

403 U.S. at 622 (citations omitted).

The early "entanglement" cases introduced into Establishment Clause analysis what can best be termed a "prophylactic

dimension". Administrative relationships between religious and civil authorities are forbidden, not only when they result in government support or direction of religious enterprises, but also when they are "pregnant with dangers of excessive government direction" of such enterprises. 403 U.S. at 620. This "prophylactic dimension" seeks to safeguard one of the root values protected by the religion clauses: "strife avoidance." Relationships which might cause religiously-based disputes are forbidden, whether or not any real friction between the church and the civil state is actually present.

In the instant case, the evidence and testimony presented in the District Court demonstrates that the creche is, for many people, a clearly religious symbol and that the City's actions in support of the creche are viewed by many as government support for a particular religious viewpoint.

Mayor Lynch himself testified that many of the people who expressed an opinion to him "had made the simple assumption that it [the creche] would always be there because it was a good thing, and they're outraged again over the questioning of what is good for all." Donnelly v. Lynch, 525 F. Supp. 1150, 1158 (D.R.I. 1981). Mayor Lynch also testified that the "bringing of [this] suit was a very divisive thing in the community and that divisiveness had never, and I am a life-long resident of the community, had never been seen in my community before." J.A. 99. Although Mayor Lynch distinguished between divisiveness caused by the instant action and the divisiveness caused by the issue which the action raises, respondents submit that such a distinction is specious. The outrage expressed by many members of the community in response to this case has its foundation in the City's sponsorship of a

religious display. The fact that the City's sponsorship has been challenged and threatened has unquestionably created political divisiveness along religious lines. As summarized by the District Court:

> In sum, the atmosphere has been a horrifying one of anger, hostility, name-calling, and political maneuvering all prompted by the fact that someone had questioned the City's ownership and display of a religious symbol.
>
> * * * *
>
> The absence of religious dissension in Pawtucket over the last forty years does not mean that the governmental action has not produced a division along religious lines. It merely means that until the [respondents] in this case had the temerity to challenge Pawtucket's official practice, the potential for divisiveness remained unrealized. When the challenge finally came, the atmosphere in Pawtucket became charged with religious

> controversy polluted by
> the acrid fumes of
> religious chauvinism."

525 F. Supp. at 1180 (emphasis in original).

While respondents recognize that this Court has never held that the potential for political divisiveness is alone sufficient to invalidate a government's action under the Establishment Clause, it has emphasized that relationships which tend to endanger religious-civil peace are forbidden because they are a "warning signal" that the mandate of the First Amendment has been compromised. Committee for Public Education v. Nyquist, 413 U.S. 756, 798 (1973). Referring to the opinion of Justice Black in Everson v. Board of Education 330 U.S. 1, 8-9 (1947), Justice Powell declared in Nyquist that "competing efforts to gain and maintain the support of government" by religious groups have precipitated "competition among religious sects for

political and religious supremacy" and "occasioned considerable civil strife." 413 U.S. at 796. "Viewing this warning signal of potential divisiveness in conjunction with [the District Court's] findings of improper purpose and impermissible effect" this Court should conclude "that the Establishment Clause has been violated in this case." Donnelly v. Lynch, 525 F. Supp 1150, 1180 (D.R.I. 1981).

Moreover, on a purely pragmatic level, a recognition that Pawtucket may display its creche would, of necessity, require decisions about the display of religious symbols on behalf of other groups as well. The government would inevitably be drawn into the process of deciding which religious symbols should be purchased with public funds and at what cost. In fact, given the non-discrimination principle which permeates Establishment Clause jurisprudence, any government

entity which expends public funds to purchase and display a sectarian symbol must trap itself in an "entanglement" quagmire of its own making, forcing itself to make constitutionally impermissible decisions about which religious groups should benefit by being given a publicly purchased symbol. One can hardly imagine a more egregious entanglement between Church and State.

CONCLUSION

This Court has observed that cases involving forced veneration of our flag are difficult, not because the legal issues are obtuse, but because the flag is our own. Similarly, this case is difficult, not because there is any serious question about the governing legal principles, but because the religion involved is so deeply venerated by so many of us.

Adherence to constitutional principle requires, however, that religious observance -- especially when it is so deeply embraced by the majority -- be confined to the private sphere.

The judgment of the United States Court of Appeals for the First Circuit should be affirmed.

Dated: August 10, 1983

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1983

DENNIS LYNCH, INDIVIDUALLY AND AS MAYOR OF THE CITY OF PAWTUCKET, RICHARD A. MUMFORD, INDIVIDUALLY AND AS FINANCE DIRECTOR FOR THE CITY OF PAWTUCKET, AND GUY DUFAULT, INDIVIDUALLY AND AS DIRECTOR OF PARKS AND RECREATION OF THE CITY OF PAWTUCKET, AND THE CITY OF PAWTUCKET,

PETITIONERS,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG GREZIER AND AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF THE PETITIONERS

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In the
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1256

DENNIS LYNCH, INDIVIDUALLY AND AS MAYOR OF THE CITY OF PAWTUCKET, RICHARD A. MUMFORD, INDIVIDUALLY AND AS FINANCE DIRECTOR FOR THE CITY OF PAWTUCKET, AND GUY DUFAULT, INDIVIDUALLY AND AS DIRECTOR OF PARKS AND RECREATION OF THE CITY OF PAWTUCKET, AND THE CITY OF PAWTUCKET,

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REPLY BRIEF OF THE PETITIONERS

I. IT IS NOT THE GOAL OF THE ESTABLISHMENT CLAUSE TO DIVORCE GOVERNMENT FROM RELIGION.

Respondents' brief, in its Summary of Argument, asserts that the municipal sponsorship in this case "...is flatly contrary to the goal of the Establishment Clause, which is to divorce religion from government." (Resp. Br., p. 20) That proposition is the foundation for the decisions below and for

the entire position of Respondents in this case. The only justification for the removal of the nativity theme from public celebrations of Christmas would be a constitutional requirement that all contact between government and religion must be eliminated. It is respectfully submitted that under the decisions of this Court, the divorcement of religion from government is not, and never was, the goal of the Establishment Clause. *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Zorach* v. *Clauson*, 343 U.S. 306 (1952); *McGowan* v. *Maryland*, 366 U.S. 420 (1960); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Abington School District* v. *Schempp*, 374 U.S. 203 (1963). Contact between government and religion has long been recognized by this Court as inevitable, permissible, and, to the extent that government is entitled to advance our national culture and tradition, desirable. In order to "divorce" itself from religion, government would be required to seek out and expunge from its activities those practices which "... are deeply imbedded in the history and tradition of this country." *Marsh* v. *Chambers*, __ U.S. __, 103 S.Ct. 3330, 3333 (1983). Such an effort is precisely what is required by the decisions below and by the position of Respondents herein. It is an effort which this Court has often repudiated as an Establishment Clause mandate.

Flowing from the proposition that the First Amendment requires government to eliminate all religious contact from its activities is the contention underlying the position of Respondents and the amici who support them that government is required to "take Christ out of Christmas."[1] It is

[1] Respondents urge acceptance of the conclusion of the District Court that it is constitutionally infirm for government to endorse the view of its citizens that "...It is a 'good thing' to have a creche in a Christmas display ...because it is a good thing to 'keep Christ in Christmas.'" (Resp. Br., p. 55) Such a conclusion, of course, assumes that the nativity theme is in fact a part of the Christmas tradition. It also assumes that the Christmas celebration is dominantly secular since it recognizes that the observance can go forward without its religious components. The essence of Respondents' position is that public observances of the holiday must "take Christ out of Christmas."

respectfully submitted that the principle of neutrality embodied in the Establishment Clause would neither authorize government to "put Christ into" Christmas nor to "take Christ out of" Christmas. The religious elements in American culture and tradition derive from the practice and beliefs of the American people, and their passive recognition by government is a simple acknowledgement of that fact. Government did not put religion into the Christmas tradition, and the Establishment Clause was not intended to require government to remove religion from its observance of that tradition. Governmental advancement of religious activity has never been part of the national tradition and is clearly prohibited by the Establishment Clause. But governmental recognition of the religious beliefs of the people and of the religious heritage of our institutions has been part of the fabric of our national life since the adoption of the First Amendment.

In *Marsh* v. *Chambers*, *supra*, this Court sustained the constitutionality of legislative prayer and the practice of paid legislative chaplaincies. Referring to the historical practice of legislative prayer, this Court held that the founding Fathers "...did not consider opening prayers as a proselytizing activity..." but rather as an activity which "harmonize(d) with the tenets of some or all religions." *Marsh* v. *Chambers*, 103 S.Ct. at 3335 (citing *McGowan* v. *Maryland*, 366 U.S. 420). Rejecting the proposition that legislative prayer was a public promotion of religious beliefs, this Court stated, at 103 S.Ct. 3336:

> "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country."

In *Marsh*, this Court reaffirmed the long-standing principle that the mere recognition of religion by government is not a

promotion of its content. What the Founding Fathers sought to prohibit in the First Amendment was "proselytizing activity."

Because Respondents' position is premised on the divorcement of government from religion, they argue that any governmental display of "undeniably sectarian" material is a violation of the Establishment Clause. (Resp. Br., pp. 13, 21-27). They reject the proposition that the use of such "undeniably sectarian" material may be nothing more than the acknowledgement of religious tradition.[2] Acceptance of this position would mean that a finding of explicitly religious content in government activity compels a conclusion of unconstitutionality. It is submitted that this argument is in sharp conflict with the decisions of this Court. It is not the explicitly religious nature of the material but rather the manner in which it is presented which determines whether government is promoting its religious content or merely recognizing religious traditions.

To support the general proposition that government is prohibited from including explicitly religious content in its sponsored activities, Respondents place heavy reliance on the decision of this Court in *Stone* v. *Graham*, 449 U.S. 39 (1980).[3] It is

[2] "Expending public funds to erect and maintain an avowedly sectarian symbol is far more than acknowledgement; it is support and enforcement." (Resp. Br., p. 27) But if, as Respondents argue (Resp. Br., p. 33), government may celebrate only the secular components of Christmas, then it would be prohibited from acknowledging the religious tradition at all. The substance of Respondents' argument is that any religious content in government activity is a promotion of religion. It is hardly less than "avowedly sectarian" for government to expend public funds for the salary of a chaplain whose duties include public prayer recitation. *Marsh* v. *Chambers*, *supra*. And the "avowedly sectarian" character of the Bible and of the Ten Commandments does not prohibit their use by public schools as part of secular instruction. *Abington School District* v. *Schempp*, *supra*; *Stone* v. *Graham*, *supra*.

[3] Respondents also rely on *Larkin* v. *Grendel's Den, Inc.*, __ U.S. __, 103 S.Ct. 505 (1983) (Resp. Br., pp. 22, 23) in which this Court invalidated a statute giving churches the right to veto governmental issuance of liquor licenses. In that case, churches were exercising governmental power delegated to them by the state, and this Court held that: "The Framers did not set up a system of government in which important discretionary govern-

submitted that such reliance not only overstates the decision in *Stone* v. *Graham*, *supra*, but also ignores the effect of *Marsh* v. *Chambers*, *supra*.[4] In *Stone*, this Court invalidated a state statute mandating the isolated display of the Ten Commandments in public school classrooms. In so doing, this Court stated that even in a public school context the Ten Commandments could be employed as part of secular instruction. Moreover, this Court has repeatedly distinguished religious content in public elementary and secondary school instruction from religious content in other forms of governmental activity. *Tilton* v. *Richardson*, 403 U.S. 672 (1971); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976). Although prayers in public schools constitute religious activity, *Engel* v. *Vitale*, 370 U.S. 421 (1962), prayers in legislatures do not. *Marsh* v. *Chambers*, *supra*.[5] Clearly, the

mental powers would be delegated to or shared with religious institutions." __ U.S. __, 103 S.Ct. 512. The constitutionality of the exercise of governmental power by churches has nothing to do with the constitutionality of recognizing religious tradition in public holiday celebrations.

[4] Respondents interpret *Stone* v. *Graham*, *supra*, as prohibiting governmental use of religious symbolism. But *Marsh* v. *Chambers* upheld certain public uses of prayer. A prayer expresses what a religious symbol may imply. If prayers can, under some circumstances, be used in public activities, it is incongruous to suggest that government may never use a religious symbol in a holiday observance.

[5] Notwithstanding this Court's decision in *Marsh* v. *Chambers*, *supra*, Respondents argue that "... government's use of sectarian religious symbolism in schools as opposed to parks is of no legal significance." (Resp. Br., p. 63, n. 19) They base this argument in part on the fact that the City's Christmas celebration includes those traditional holiday components which appeal to children. But the obvious thrust of the celebration is the observance of the entire festival of Christmas, and this would be apparent even in the school setting. *Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980), *cert. den.* 449 U.S. 987 (1980). Furthermore, the display which includes the creche is situated in the commercial shopping area of the City likely to attract only those children who are accompanied by adults, or at least have the permission of adults to attend. Attendance in a public school classroom is mandatory, and the atmosphere is instructional; these factors have been critical to this Court's special treatment of religion in the educational environment. Anyone who visits the Hodgson Park display in this case is obviously there to celebrate Christmas—not to receive instruction under coercion of law.

religious content of prayer in legislatures is no different from the content of prayer in schools. Nor is the religious content of the Ten Commandments or of the Bible any different whether they are used for instruction or for religious exercises.[6] Emphasis upon the religiosity of the challenged element in government action fails to meet the Establishment Clause criteria developed by this Court. The constitutional issue is whether the government action is promoting religious beliefs or merely acknowledging religious tradition, and that issue must be resolved by an examination of the context within which the religious component is found.

II. The Passive Use Of Religious Symbolism In A Secular Public Holiday Celebration Is A Permissible Acknowledgment of Religion.

In this case, the most important part of the context of the City's sponsorship is the Christmas holiday itself. Although Respondents argue that "... Pawtucket has chosen to enlist the power of the state to celebrate... religious dogma" (Resp. Br., p. 20), on the record in this case a failure to conclude that the City is celebrating the national folk festival of Christmas is, to use Respondents' language (Resp. Br., p. 26), "to blink at reality." The inclusion of religiosity in public holiday celebrations is as "... deeply imbedded in the history and tradition of this country..." (*Marsh* v. *Chambers*, 103 S.Ct. at 3333) as is the practice of legislative prayer. Presidential Thanksgiving proclamations were, from the beginning, avowedly religious in content—far more so than the inclusion of a creche in a

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[6] Just as the Ten Commandments can legitimately be employed in secular school instruction, they can also be used as a traditional symbol of law. *Anderson* v. *Salt Lake City Corporation*, 475 F.2d 29 (10th Cir. 1973); see also Amicus Brief of the United States herein, p. 14.

secular Christmas display.[7] Clearly, the Founding Fathers did not intend that such explicit religiosity was a violation of the Establishment Clause; they viewed it instead as "...a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh* v. *Chambers*, 103 S.Ct. 3336. And, unlike the contemporary American Christmas, the thanksgiving holiday established by the Founding Fathers was exclusively religious.[8] If, as Respondents argue, government could, under the Establishment Clause, celebrate only the secular components of Christmas, then the thanksgiving holidays created by the founding Fathers could not have been celebrated at all. Those holidays were observed because the Framers of the Constitution regarded them—with their explicit religious content—as a permissible acknowledgment of religion.

The nativity theme in the national observance of Christmas is an integral part of the holiday which coincides with religious beliefs in much the same way that Sunday closing laws coincide with religious practice. *McGowan* v. *Maryland*, *supra;* see *Marsh* v. *Chambers*, *supra*. Respondents contend that *McGowan* v. *Maryland* "...has little relevance here..." (Resp. Br., p. 34) And one of their amici argue that this case and *McGowan* "could not be more different."[9] But *McGowan*

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[7] President Washington's proclamation of October 3, 1789, began by stating that, "...It is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor..." The proclamation went on to record, "...both Houses of Congress have, by their joint committee, requested me 'to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness.' " Messages and Papers of the Presidents, Bureau of National Literature, Inc., 1897, Vol. I, p. 56.

[8] *Id.*

[9] Brief Amicus of Anti-Defamation League and American Jewish Congress, p. 12. That brief attempts first to distinguish *McGowan* on the ground that Sunday closing laws regulate a secular activity. But the celebration of Christmas is also a secular activity. See Brief of Petitioners herein, pp. 16-21. Secondly, that brief asserts that Sunday closing laws provide "...only an in-

v. *Maryland* stands for the principle that government action may benefit religion if that action has a dominantly secular design and impact. It also stands for the principle that religious elements which remain in contemporary secular tradition with religious origins do not prevent government from observing that tradition. If, as Respondents concede, government is entitled to celebrate Christmas, it is because the holiday is secular; the observance of its religious component is an indirect and incidental acknowledgment of religion.

Respondents disavow a constitutional attack on public celebrations of the Christmas holiday (Resp. Br., pp. 32-33) simply by asserting that they do not challenge either the legalization of the holiday or observance of its secular components. Their argument seems to be that government may celebrate Christmas as long as it pretends that the nativity theme is not part of the holiday tradition. But the fact is that the nativity theme is the origin of the holiday tradition. As the dissenting opinion below points out (Cert. Pet. A-197), it is not consistent to permit celebration of a holiday whose religious roots are imbedded in its tradition while at the same time prohibiting acknowledgment of these roots. A nativity scene in December is no more explicitly religious than are the words "Christ" and "Mass" in the word "Christmas."

Respondents' brief quotes, and urges on this Court, the conclusion of the District Court that, "...Pawtucket's use of a patently religious symbol raises an inference that the City approved and intended to promote the theological message that the symbol conveys." (Resp. Br., p. 53, citing 525 F.Supp. 1172) Such a conclusion is clearly at odds with the decision of this Court in *Marsh* v. *Chambers*, *supra*, which held that the

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direct benefit to religion because the statutory day of rest coincides with the religious day of rest." But Sunday is the day on which millions of Americans practice their religious beliefs. It is also the day on which many Christian churches depend for their financial support. To suggest that a Christmas symbol benefits religion as much as or more than Sunday closing laws is unrealistic.

Founding Fathers viewed "patently religious" prayer as a permissible acknowledgment of religion.[10] It is a conclusion which would have compelled the invalidation of the "patently religious" 1789 Thanksgiving proclamation of President Washington.[11] Also, the conclusion of the District Court ignores the fact that "...the nativity scene has 'acquired a significance which is no longer confined to the religious sphere of life.' " *Citizens Concerned for Separation of Church and State* v. *City and County of Denver*, 508 F.Supp. 823 (1981) citing *Florey* v. *Sioux Falls School District*, *supra*; see also *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970); *A.C.L.U.* v. *Harris County*, S.D. Tex., C.A. No. H-82-3875, Memorandum and Order, August 4, 1983. The nativity theme is an accepted and traditional part of the American Christmas, and to recognize Christmas but prohibit the recognition of one of its components "...would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state." *McGowan* v. *Maryland*, 333 U.S. 445.

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[10] Respondents argue that religion may be employed in government activity only if its use is, in Respondents' word, "rote." (Resp. Br., p. 55, n. 18) This would mean that government may acknowledge religion only if it is not taken seriously. The Founding Fathers evidenced no such intent, and their public conduct was totally inconsistent with such a view toward religion. The public prayers of Samuel Adams and George Washington were anything but "rote." The disdain for religious sincerity implicit in Respondents' argument is hardly in keeping with the creation of Thanksgiving as a national day of Prayer.

[11] See footnote 7.

Conclusion

For the reasons stated and upon the authorities cited, the judgment of the Court of Appeals should be reversed, and the case should be remanded for entry of judgment in favor of the Petitioners.

Respectfully submitted,

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IN THE

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DENNIS LYNCH, Individually and as Mayor of the City of Pawtucket, RICHARD A. MUMFORD, Individually and as Finance Director for the City of Pawtucket, and GUY DUFAULT, Individually and as Director of Department of Parks and Recreation of The City of Pawtucket, and the CITY OF PAWTUCKET,

Petitioners,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER and AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE AMERICAN JEWISH COMMITTEE AND THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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Question Presented

Whether the display of a city-owned Creche in a city-sponsored Christmas celebration violates the Establishment Clause of the First Amendment to the United States Constitution.

Statement of Interest

The American Jewish Committee (AJC) and the National Council of Churches of Christ in the U.S.A., as *amici curiae*, respectfully submit this brief supporting affirmance of the decision below.

The American Jewish Committee, a national organization of approximately 50,000 members founded in 1906, is dedicated to the defense of the civil rights and religious liberties of American Jews. We believe this goal can best be accomplished by helping to preserve the constitutional and civil rights of all Americans. Specifically, AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value both to religion and to the community generally. We deem any breach in the wall separating Church and State as jeopardizing the political and religious freedoms which the wall was intended to protect. We submit this brief because we believe that a city-sponsored display of a city-owned Creche breaches government neutrality towards religion, in violation of the Establishment Clause of the First Amendment. The Creche, which depicts the birth of Jesus as the birth of a divinity, is unmistakably and unalterably religious. The clear sponsorship by the State of a particular religious doctrine represents government advancement of a particu-

lar religion and tends to entangle the government in promulgation of one religious doctrine over another, in violation of the First Amendment. We would feel the same with regard to a city-sponsored display of a city-owned menorah or any other religious symbol. The First Amendment is equally contravened by government sponsorship of any or all religions.

The National Council of the Churches of Christ in the U.S.A. is the cooperative agency of thirty-one national religious bodies in the United States having an aggregate membership of over 40,000,000. The Council does not presume to speak for all of those adherents but for its Governing Board, a body of some 280 members appointed by the several member denominations in proportion to their size and their support of the Council. As long ago as 1959, that body adopted a policy statement opposing the "Christian amendment" proposal (which would have inserted in the U.S. Constitution the assertion that "this is a Christian nation") in terms that are equally applicable to the acts of any state or municipality that would endorse or appear to endorse the view that Christianity or Christians enjoy or appear to enjoy some special privileged or proprietary role or rank with respect to governmental favor or sponsorship:

> To declare the United States a Christian nation in the churchman's sense of "Christian" is to assert less of truth than of pretension. . . . It is perilous, even sacrilegious, to turn to the political forum for practical determination of the public meaning of the great word "Christian." The church cannot share this word, central and peculiar to its character, with the nation-state.
>
> Previous attempts to maintain "Christian states," in earlier centuries as well as in our own, have been

> fraught with great problems and have failed in disillusion. They have frequently denied general liberty, and religious liberty in particular, to all who did not belong to the dominant body of Christians. In the American scene of today, [such a claim] would tend to weaken the rights of citizens and others who are not Christians, to lessen respect for their distinctive concerns, and to accentuate divisions within the body politic.

In the view of *amicus* National Council of Churches, the principal offense of the Nativity shrine owned, erected and illuminated by the City of Pawtucket as part of its Christmas display is not just that it degrades and secularizes a sacred symbol of Christianity, though it does tend to do that, but that it represents either a presumptuous sponsorship by government of that religion and its symbols or an equally presumptuous identification by Christians of their religious traditions with the institutions of government (or both), in any case an affront to persons of other religious persuasions or none—who are not less citizens because of that, and no less participants in and beneficiaries of municipal activities than Christians are, yet who are told by the symbolic usages complained of—more clearly than by words—that "this is a *Christian* town (state) (nation), and if you don't like it, that's too bad!"

This affront to non-Christian citizens is not only unjust, but no real boon to Christianity. Earning it the well-deserved resentment of non-Christians, such a display does not greatly enhance the piety of Christians, while at the same time trivializing their holy symbols. The insistence upon "keeping Christ in Christmas" by means of *state action* is predicated upon, and arrogantly expresses,

the conviction that the majority rules—and is entitled to rule—in matters of religion as in secular matters. That assumption is consonant with the European tradition of mere religious *toleration*, from which the Pilgrims and many others of our forebears fled; it is not consonant with the condition of full religious *freedom* which they erected here upon the adventurous foundation of the First Amendment, by which all citizens are equally citizens irrespective of their religious commitments, and no citizens are to be rendered "second class" because they are in a *religious* minority while the religious majority enjoys a seeming espousal of *its* religious emblems by the agencies of the state.

At the same time, *amicus* National Council of Churches is distressed by what may seem to be a disposition of courts and public officials to overcorrect for excesses of this type by the banishment of religion from public life altogether. The privatization, marginalization and sequestration of religious activity, interests, symbolism and discourse is something that *amicus* is determined to resist. Religion has been, is, and must continue to be a vital, vigorous and legitimate element in American public life. But that should be effected, not by *state action*, but by *citizen* action. There are many ways in which citizens, individually and in voluntary private groups of their own choosing, can express their religious views, commitments, symbols and aspirations without employing or seeking to employ the machinery of the State for *their* free exercise of religion.

At the Christmas season, for instance, it would be entirely appropriate for Christian organizations to erect Nativity shrines on their own private property adjacent to

the park in Pawtucket or even in the (private) park itself *at their own expense and by their own efforts.* It might even be permissible for them by private action to place a Creche at Christmas on the town "common"—if there is one—in the same sense that religious meetings can be carried on by private initiative in a public park or other public forum subject only to reasonable regulations of time, place or manner (*Hague* v. *CIO,* 307 U.S. 496 (1939)), or that student religious meetings can be held in the "limited public forum" provided by a state university on the same terms as student non-religious meetings (*Widmar* v. *Vincent,* 454 U.S. 263 (1981)). This distinction between government and society, between state action and private collective action in the public (but non-governmental) arena is essential to preserve the true free exercise of religion without its establishment, and *amicus* National Council of Churches urges the Court to extend and apply that distinction, already emerging in *Widmar,* to the instant case.

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Supreme Court of the United States

October Term, 1982

DENNIS LYNCH, Individually and as Mayor of the City of Pawtucket, RICHARD A. MUMFORD, Individually and as Finance Director for the City of Pawtucket, and GUY DUFAULT, Individually and as Director of Department of Parks and Recreation of The City of Pawtucket, and the CITY OF PAWTUCKET,

Petitioners,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER and AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE AMERICAN JEWISH COMMITTEE AND THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

This brief is submitted with the consent of the parties.

Statement of the Case

The facts of the case are set forth in the briefs of the parties hereto and in the opinion of the District Court reported at 525 F. Supp. 1150 (D.R.I. 1981), and thus need not be repeated here. Although petitioners, in addition to arguing the merits, argued below that respondent municipal taxpayers lacked standing to prosecute this action,[1] in their brief to this Court petitioners have abandoned any such argument and now raise solely the question of whether municipal sponsorship of a Nativity Creche violates the Establishment Clause. We submit this question can only be answered in the affirmative.

Summary of Argument

A Creche is a fundamentally religious symbol representing religious doctrine central to Christianity. It cannot be viewed simply as a secular symbol of the Christmas season. Municipal ownership and sponsorship of such a central religious doctrine thus offends the Establishment Clause of the First Amendment, which mandates a complete and unequivocal separation between religion and govern-

1. Federal courts have traditionally accorded standing to municipal taxpayers but not to federal taxpayers. *Frothingham* v. *Mellon*, 262 U.S. 447 (1923). An exception from the latter prohibition was created in *Flast* v. *Cohen*, 392 U.S. 83 (1968) but in turn was narrowly construed in the recent decision of *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982). Petitioners' attempt below to read into the *Valley Forge* limitation on the exceptional case where there exists federal taxpayers standing some more general limitation on the unexceptional case where there exists municipal taxpayers standing was lucidly disposed of by the Court of Appeals below in its discussion at 691 F.2d 1029, 1030-32 (1st Cir. 1982).

ment and a wholesome neutrality towards various sects and denominations. That such municipal activity is unconstitutional is manifest, whether the Court applies the "strict scrutiny" test of *Larson* v. *Valente* or the tripartite test of *Lemon* v. *Kurtzman*. The Establishment Clause forbids every form of public aid or support for religion, whether aiding one religion, aiding all religions or preferring one religion over another. It is this separation between religion and government which has secured and maintained religious liberty for citizens of all denominations and of no denomination.

ARGUMENT

Governmental Sponsorship of a Nativity Creche Violates the Establishment Clause.

A. A Nativity Creche Is a Totally Religious Representation; Its Placement Among More Secular Symbols in this Case Did Not Deprive It of this Essentially Religious Character.

The Creche in this case is simply a large-scale version of the standard Nativity Creche frequently erected at Christmas-time in front of churches and on lawns of devout Christians. Its sole and obvious content is the depiction, in adorational terms, of the birth of a divinity in the form of the infant Jesus. It is hard to think of a doctrine that is more quintessentially religious in nature than that embodied in the Creche. The doctrine of the birth of Jesus is not only central to Christianity but also serves, both historically and theologically, to separate Christianity from other religions. Thus, petitioners' suggestion that this

Court in effect ignore the sole overt message of the Creche, and ignore its historical and theological significance, is to ask this Court to ignore the obvious, and ignore the religious sensibilities of both Christians and Jews alike, by pretending that a manifestly doctrinal picture-statement is no more religious than a tree, a star, or a Santa Claus. As Circuit Judge Bownes stated in his concurring opinion below, "To view the Creche as only one of the many symbols of the Christmas holiday season is to denigrate its religious significance and misinterpret the historical background of Christmas." (691 F.2d at 1037).

Even petitioners admit that "[o]f all the Christmas symbols, the Creche alone retains some religious significance in a religious setting. . . ." (Petitioners' Brief at page 20). Nevertheless, they claim—and this is the entire thrust of their argument to this Court—that "in the context of the conventional Christmas display, even the Creche is still primarily a [secular] symbol of the Christmas season." (*Id.*). This view is fallacious, for several reasons.

First, petitioners are unable to point to any substantial evidence that the Creche is in any meaningful respect simply a secular symbol of the Christmas season, let alone that it is "primarily" a secular symbol. Indeed, after considerable hearings, the District Court in this case rejected, as factually unfounded, any contention that the Creche directly partook of any such secular symbolism. Moreover, the District Court, in findings which were expressly adopted by the Court of Appeals, determined that if any secular symbolism could be attributed to the Creche at all, such "independent, secular meaning . . . is subordinate to,

and indeed flows from . . . [its] fundamentally religious significance. . . ." (525 F. Supp. at 1167, quoted at 691 F.2d at 1032).

Furthermore, such findings are amply confirmed by common sense and everyday experience; for it is a commonplace observation that, while many Christians (and even some non-Christians) place colored lights, stars, trees, and other ornaments on their windows and lawns during the Christmas season, those who erect Creches are almost invariably those who wish to emphasize the religious and sectarian aspects of Christmas.[2] After all, Christmas as a religious (as opposed to secular) celebration commemorates the birth of Jesus as Christ, the Son of God. By depicting this very event—depicting it, moreover, in strictly religious terms, with the Christ-Child being worshipped as God by kings and shepherds alike—the Creche is inextricably, inescapably symbolic of the religious view of Christmas. Indeed, it is difficult to imagine a more direct representation of the religious view of Christmas than the Creche.

Second, given this strong doctrinal overlay, the Creche does not become secularized and devoid of its religious import simply by being placed in proximity with other symbols of Christmas that are secular in nature. While "context"—on which petitioners place so much stress—is not without some influence upon the way in which an object is

2. See *Goldstein* v. *Fire Department of the Village of Suffern,* 559 F. Supp. 1389 (S.D.N.Y. 1983), holding that the erection of a sign reading "Keep Christ in Christmas" on the front of a municipal firehouse violates the Establishment Clause, since the sign referred to the "Christian theory of Christmas" and "created the obvious impression that defendants either were promoting or approving of the theological origins of Christmas." (*Id.* at 1391).

perceived, it nonetheless remains true that an orange cannot be transformed into an apple simply by being placed in a bushel basket instead of a crate. Unlike an inherently ambiguous symbol like a star or a tree, a Creche—which on its face conveys a specific religious message and doctrine—cannot readily be secularized simply by being placed near some secular object (let alone the ambiguous objects that formed the rest of the display in this case).

In this respect, it is also well to recall the District Court's observation that:

> Christmas remains a major spiritual feast day for most sects of Christians. It has not lost its religious significance; rather, it has gained a secular significance. Janus-like, it is one holiday with two distinct and very different faces. (525 F. Supp. at 1163).

Given this two-fold nature of Christmas, there is no reason to suppose that a person who visits those portions of a display that carry depictions associated with the secular face of Christmas will automatically impart some notion of secularity to the portion of the display portraying religious dogma. On the contrary, it is more reasonable to assume that the observer will believe that he has now passed from the portions of the display celebrating secular Christmas to the portion of the display celebrating religious Christmas.

Finally, if "context" is somehow to be the talisman for assessing whether a Creche is secular or sectarian in nature, it becomes appropriate to view the entire historical and social context relating to the Creche and not merely its immediate physical context. As noted, the Creche not only

displays a central event in the origins of Christianity but also represents a central doctrine—the belief in the divinity of Jesus—which first and foremost separates Christians from other religions.

It is because of the fundamentally religious nature of the Creche that the sensibilities of non-Christian Americans and Christians who are offended by such use of a religious symbol must be recognized. Nor do we believe we are being hyper-sensitive or overly-fastidious in this regard.[3] On the contrary, it was protection against just such dangers, not only to Jews but to Christian and other religious sects as well, that led to the promulgation of the Establishment Clause itself.[4]

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3. In one of the few cases of which we are aware in which a federal court upheld the erection of a Creche by a governmental instrumentality, the Court acknowledged that "there are a number of citizens of the City and County of Denver who perceive the scene as an endorsement by the City of the Christian faith," but held that "the First Amendment does not require the prerogatives of government be limited by the sensibilities of its most sensitive or fastidious citizens." *Citizens Concerned for Separation of Church and State* v. *City and County of Denver*, 526 F. Supp. 1310, 1315 (D. Col. 1981). We submit that the District Court in that case wholly misperceived the proper balance. The "sensibilities" involved in any Creche case are, at the minimum, those of members of all those faiths who do not subscribe to the central tenet of Christianity represented by the Creche, not to mention those Christians who object to the trivialization of such a tenet incumbent upon the use of a Creche by the State for non-religious (and usually commercial) purposes. Conversely, it is hard to see how, in being deprived of the "prerogative" to erect a Creche, a municipality is being deprived of any meaningful right or power whatever, since, on the municipality's own argument, there are numerous other "secular" symbols of Christmas available for its purposes. Further, such an argument assumes that a municipality has a right or power to engage in such activities, which *Amici* deny.

4. Thus, in attempting to elucidate the meaning of the Establishment Clause this Court, in *Everson* v. *Board of Education*, 330 U.S. 1, 8-9 (1947), offered the following observations regarding the background and environment of the period in which it was adopted:

(footnote continued on next page)

B. Governmental Sponsorship of a Creche Violates Basic Constitutional Principles of Governmental Neutrality Towards Religion.

In light of the history and purposes of the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion. . ."—a mandate made binding on the states by virtue of the Fourteenth Amendment[5]—this Court has not infrequently concluded that government must observe a "complete and unequivocal" separation between Church and State[6] and a wholesome "neutrality" toward various sects and denominations.[7] As this

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A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them. [footnote omitted].

5. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

6. *Zorach* v. *Clauson*, 343 U.S. 306, 312 (1952).

7. *Abington School District* v. *Schempp*, 374 U.S. 203, 222 (1963). In *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664, 669 (1970), this Court reiterated the basic purpose of the Religion Clauses of the First Amendment, which is "to insure that no

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Court stated only last year in *Larson* v. *Valente,* 456 U.S. 228, 246 (1982):

> Since *Everson* v. *Board of Education,* 330 U.S. 1 (1947), this Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can "pass laws which aid one religion" or that "prefer one religion over another." *Id.,* at 15. This principle of denominational neutrality has been restated on many occasions. In *Zorach* v. *Clauson,* 343 U.S. 306 (1952), we said that "The government must be neutral when it comes to competition between sects." *Id.,* at 314. In *Epperson* v. *Arkansas,* 393 U.S. 97 (1968), we stated unambiguously: "The First Amendment mandates governmental neutrality between religion and religion. . . . The State may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute." *Id.,* at 104, citing *Abington School District* v. *Schempp,* 374 U.S. 203 (1963).

Given the religious heterogeneity of our country and the emergence of questions of constitutional dimension which might not have been foreseen by its Framers, the First Amendment must be given a "broad interpretation," *Everson* v. *Board of Education,* 330 U.S. 1, 15 (1947), and must be "responsive to the . . . highly charged nature of religious questions in contemporary society," *Abington School Dis-*

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religion be sponsored or favored, none commanded, and none inhibited" by the government. In that case, the Court found that a uniform property tax exemption for certain non-profit organizations, including religious organizations, did not amount to government sponsorship of religion. Rather, contrary to the government activities in the case at bar, the tax exemption complemented and reinforced the desired separation because it accomplished avoidance of a government demand that religion support the sovereign and avoidance of the excessive financial entanglement that would result from the collection and enforcement of such tax against religious organizations. *Id.* at 675-76.

trict v. *Schempp*, 374 U.S. 203, 241 (1963) (Brennan, J., concurring).

From what has been already stated in Section A of this brief, it is patent that a Creche cannot be viewed other than as direct and unequivocal support for a doctrine that is central to Christianity. Accordingly, under any test, governmental erection of a Creche offends the Establishment Clause and must be struck down. This is true whether one applies the so-called "strict scrutiny" test of *Larson* v. *Valente, supra,* which the Court of Appeals applied in this case; the tripartite test of *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), which the District Court applied in this case; or any other appropriate standard.

The "strict scrutiny" test is, we submit, the most appropriate one, since, under the doctrine of *Larson* v. *Valente,* it is to be applied to any state action that grants a "denominational preference." Under the "strict scrutiny" test, any such action is suspect and "must be invalidated unless it is justified by a compelling governmental interest, cf. *Widmar* v. *Vincent,* 454 U.S. 263, 269-270 (1981), and unless it is closely fitted to further that interest, *Murdock* v. *Pennsylvania,* 319 U.S. 105, 116-117 (1943)." *Id.* at 247.

In the instant case, petitioners do not seriously contend that erection of a Creche furthers some compelling governmental interest, let alone that it is closely fitted to furthering that interest; rather, their contention is that the "strict scrutiny" test is not applicable at all, because the action they took was not the erection of a sectarian Creche that favored one denomination, but the erection of a "primarily secular" Creche that favored no one denomination

more than another. Stated another way, petitioners claim that to apply the "strict scrutiny" standard is in effect to presuppose the very issue on which this case turns.

However, this argument advanced by petitioners is not persuasive. For not even petitioners claim that the Creche is, on its face and by itself, strictly secular in nature; rather, as quoted above, they concede that the Creche "retains some religious significance" (Petitioners' Brief at page 20) but contend that in this case this significance was overcome by the secular "context" in which the Creche was displayed. Thus, they claim that they were able to adapt that which on its face and by itself is a religious symbol to achieve a predominantly secular purpose (primarily, the commercial purpose of attracting shoppers). But, given the policy behind the "strict scrutiny" test, this would seem to be precisely the kind of situation in which the "strict scrutiny" test should be applied. For surely the central question regarding the use of the Creche—given petitioners' own rationale for its use—is whether some "compelling" governmental interest required the municipality to use the otherwise religious symbol, the Creche, to achieve its secular purpose. Why not use lights, or bells, or trees, or reindeer, or Santa Clauses, or any of the other more secular symbols of Christmas to achieve the municipality's secular purpose in this case? Why take a symbol that by itself is concededly religious in nature and try to adapt it, however successfully, to the secular purpose? There was no need, certainly no compelling need, for the municipality to thus flirt with violation of the Establishment Clause. Hence, a "strict scrutiny" test is wholly appropriate, and wholly dispositive, as the Court of Appeals found.

Even if a "strict scrutiny test were not applicable, the familiar tripartite test of *Lemon* v. *Kurtzman* is equally dispositive in establishing the unconstitutionality of the Creche, as the District Court found. Under *Lemon* v. *Kurtzman*, a challenged governmental activity violates the Establishment Clause unless it satisfies each of three requirements: first, the activity must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion." *Lemon* v. *Kurtzman*, 403 U.S. at 612-13.

The District Court found that the municipality's erection of the Creche failed to satisfy *any* of these three tests, let alone all three. (525 F. Supp. at 1170-80). The Court of Appeals, while questioning the sufficiency of the District Court's analysis as to the third test, entirely agreed with its analysis respecting the first and second test—failure to meet either one of which was sufficient to invalidate the use of the Creche. (691 F.2d at 1033-34). We respectfully refer this Court to these analyses of the two courts below as demonstrating why erection of the Creche in this case fails to meet the tests of *Lemon* v. *Kurtzman;* but we also would add a few further observations.

***With respect to the first test*—that the challenged action must have a secular purpose—the lower courts found that the addition of the Creche did not in any way enhance the proclaimed economic, cultural and traditional purposes of the display. On the contrary, the District Court expressly found that the municipality's purpose was really "to endorse and promulgate religious belief by including a nativity scene in its display." (525 F. Supp. at 1173). But**

even if petitioners could somehow have shown that the erection of the Creche furthered one or more of the proclaimed secular purposes, this would not have been sufficient to satisfy the first test under *Lemon* v. *Kurtzman*. For even under the first test of *Lemon* v. *Kurtzman*, let alone under the "strict scrutiny" test, it is well-established that a government may not "employ religious means to reach a secular goal unless secular means are wholly unavailing." *Abington School District* v. *Schempp*, 374 U.S. at 294 (Brennan, J., concurring). Here, the municipality's proclaimed proposes for sponsoring the Christmas display would be amply satisfied without the inclusion of the Creche. *See American Civil Liberties Union of Georgia* v. *Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098 (11th Cir. 1983) (rejecting the Chamber of Commerce's alleged secular purposes of promoting tourism by erecting a large, lighted cross on state park property); *Gilfillan* v. *City of Philadelphia*, 637 F.2d 924 (3rd Cir. 1980), *cert. denied*, 451 U.S. 987 (1981) (rejecting the City's alleged secular purpose of improving public relations by constructing a platform, including a cross, to be used by the Pope in conducting a religious service); *Stone* v. *Graham*, 449 U.S. 39 (1980) (rejecting the posting of the Ten Commandments on the wall of each public school classroom in Kentucky, despite the school district's assertion of a secular educational purpose).

With respect to the second test—that the principal or primary effect of the challenged action must be one that neither advances nor inhibits religion—both the District Court and the Court of Appeals expressly found that the primary effect of the erection of the Creche was to advance religion. (525 F. Supp. at 1176-78; 691 F.2d at 1035). We

would add only that, with respect to this aspect of the *Lemon* v. *Kurtzman* standard, all the petitioners' arguments about the importance of "context" really cut against them. For, as noted earlier, Christmas in America has a Janus-like quality: it can be regarded as either a secular or a religious holiday, depending upon the symbols and other "cues" associated with its celebration. By introducing into a display of otherwise secular or ambiguous symbols a symbol of overt and unambiguous religiosity in the form of the Creche, the municipality not only endorses a specific religious message but also conveys to the more ambiguous symbols in the display an aura of association with specific Christian beliefs that might otherwise go unnoticed. As the District Court noted, "[t]his aura of governmental approval is a subsidy as real and as valuable as financial assistance." (525 F. Supp. at 1178).

With respect to the third test—that the challenged action must not foster "an excessive governmental entanglement with religion"—the District Court inferred such an entanglement from the fact that the municipality's placement of the Creche in the display, when ultimately challenged by way of lawsuit, gave rise to great acrimony and divisiveness in the community; but the Court of Appeals declined to treat such divisiveness *per se* as a sufficient basis for inferring such a violation of the third test of the *Lemon* v. *Kurtzman* standard. Without entering into this debate, we submit that the simple fact of the government's endorsing a clear visual statement of a doctrine that is the central dividing line between Christian and non-Christian religions is sufficient "entanglement" to violate the third test.

This endorsement translates into very tangible entanglement. Public funds are being expended to erect, illuminate, maintain, disassemble and store the Creche. City employees or city paid contractors are paid for and spend time performing these tasks. The City reimburses the park's owner for all of the electricity used by the display. The very expenditure of public funds, no matter how small in amount, to finance a religious exercise "that only some of the people want and that violates the sensibility of others," breaches the separation of government from religion, entangles the State in religion, and violates the Establishment Clause. *Abington School District* **v.** *Schempp,* **374 U.S. at 229-30 (Douglas, J., concurring).**

Moreover, we would also note that the commercial use made of the Creche by the municipality in this case fosters a different kind of entanglement, to wit, the misappropriation by the State for its secular purposes of sacred symbols thought to be reserved for religious purposes. Thus, the primary use here made of the Creche—to attract shoppers —might well be viewed by many devout Christians as a profanation, detracting from the religious significance of the Nativity scene.[8] Such misuse of religion is as fully

8. In his dissent in the recent case *Marsh* v. *Chambers,* 51 U.S.L.W. 5162, 5168 n.16 (1983), Justice Brennan quotes a leading Methodist clergyman for this very point:

> "[Some propose] to reassert religious values by posting the Ten Commandments on every school-house wall, by erecting cardboard nativity shrines on every corner, by writing God's name on our money, and by using His Holy Name in political oratory. Is this not the ultimate in profanity? . . .
>
> "What is the result of all this display of holy things in public places? Does it make the market-place more holy? Does it improve people? Does it change their character or motives? On

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prohibited by the Establishment Clause as activity which intends to endorse religion. As this Court recognized in *Engle* v. *Vitale*, 370 U.S. 421, 431 (1962), where the Court held that a 22-word prayer used in daily classroom exercises in New York was a religious activity, the "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion."

In our view then, the governmental endorsement of a Creche cannot pass constitutional muster under any one of the three prongs of the test of *Lemon* v. *Kurtzman*, let alone under any of the requirements of the "strict scrutiny" test of *Larson* v. *Valente*. Even if this were not true, however, we submit that government erection of a Creche would be in violation of the Establishment Clause. Government erection of a menorah or any other religious symbol would equally violate the Establishment Clause. For these "tests must not be viewed as setting the precise limits to the necessary constitutional inquiry but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek* v. *Pittenger*, 421 U.S. 349, 359 (1975). In the end, the ultimate tests are still those policies of separation of Church and State and neutrality toward various denominations that underlie the Establishment Clause (and, for that matter, the Free Exercise Clause) of the Constitution. The Establishment Clause forbids every form of public aid or support for religion, whether aiding

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the contrary, the sacred symbols are thereby cheapened and degraded. The effect is often that of a television commercial on a captive audience—boredom and resentment." Kelley, D.M., Beyond Separation of Church and State, 5 J. Church and State 181, 190-91 (1963).

one religion, aiding all religions or preferring one religion over another. *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 771 (1973); *Abington School District* v. *Schempp*, *supra* at 216; *Engel* v. *Vitale*, *supra* at 426; *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961); *Everson* v. *Board of Education*, *supra* at 15. In other words, the Establishment Clause was intended to erect " 'a wall of separation between Church and State.' " *Everson* v. *Board of Education*, *id.* at 16. It is this very separation which " 'has secured religious liberty from the invasion of the civil authority.' " *Id.* at 15.

No amount of lip-service paid to the supposedly secular nature of the "American Christmas" can disguise the fact that the Creche expresses in pictorial form the most central doctrines of the Christian religion. Governmental endorsement and support for such a presentation thereby violates in most cavalier fashion the letter, the spirit, and the purpose of the Establishment Clause.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

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DENNIS LYNCH, Individually And As Mayor Of The City Of Pawtucket,

RICHARD A. MUMFORD, Individually And As Finance Director For The City Of Pawtucket, And

GUY DUFAULT, Individually And As Director Of Department Of Parks And Recreation Of The City of Pawtucket, And

THE CITY OF PAWTUCKET,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

May a city own, erect and maintain, as part of a Christmas display, a nativity scene depicting the birth of the Christian Messiah, Jesus?

CONSENT OF THE PARTIES

Petitioners and Respondents have consented to the filing of this brief, and their letters of consent will be filed with the Clerk of the Court.

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CONSTITUTIONAL PROVISIONS INVOLVED

1. First Amendment to the Constitution of the United States.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. Fourteenth Amendment to the Constitution of the United States.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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In the

Supreme Court of the United States

October Term, 1982

DENNIS LYNCH, Individually And As Mayor Of The City Of Pawtucket, RICHARD A. MUMFORD, Individually And As Finance Director For The City Of Pawtucket, And GUY DUFAULT, Individually And As Director Of Department Of Parks And Recreation Of The City of Pawtucket, And The CITY OF PAWTUCKET,

Petitioners,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER And AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF AMICI CURIAE OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENTS

Amici support the position of respondents and respectfully submit that the judgment of the United States Court of Appeals for the First Circuit in the above-captioned case should be affirmed.

INTEREST OF THE AMICI CURIAE

The Anti-Defamation League of B'nai B'rith (ADL) was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the

general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

In support of this principle, the Anti-Defamation League has previously filed *amicus* briefs before this Court in such cases as *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) and *School District of Abington Township, Pennsylvania* v. *Schempp*, 374 U.S. 203 (1963). The League is able to bring to the issues raised on this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

The American Jewish Congress, which was founded in 1918, is a membership organization of American Jews dedicated to the protection of the civil liberties of all Jews and of all Americans and in this regard is committed to the separation of church and state. Among their many activities directed to these ends, the American Jewish Congress has in the past filed *amicus curiae* briefs in this Court, *e.g.*, *Marsh* v. *Chambers*, ___ U.S. ___, 51 U.S.L.W. 5162 (July 5, 1983).

At issue in this case is the constitutionality under the establishment clause of the first amendment, of Pawtucket, Rhode Island's sponsorship of a nativity scene depicting the birth of the Christian Messiah, Jesus.

Amici submit the accompanying brief because they believe the instant case raises serious questions concerning government support and preference of one religion — Christianity — in contravention of the establishment clause of the first amendment.

STATEMENT OF THE CASE

For forty years, the city of Pawtucket has owned and annually erected as part of its annual Christmas display, a near life size nativity scene depicting the birth of the Christian Messiah, Jesus, according to the New Testament (Joint Appendix hereinafter "J.A.") (J.A. 33, 105).

Plaintiffs, residents and taxpayers of Pawtucket, Rhode Island, and the Rhode Island affiliate of the American Civil Liberties Union (ACLU) challenged the forty-year practice by the city of

Pawtucket of owning and annually displaying a nativity scene of the biblical birth of the Christian Messiah charging that this practice constituted an establishment of religion in contravention of the establishment clause of the first amendment.

The District Court for Rhode Island held for plaintiffs and found that Pawtucket's inclusion of a nativity scene in its Christmas display violated the establishment clause. *Donnelly* v. *Lynch*, 525 F. Supp. 1150 (D.R.I. 1981).

The court ruled after a three-day trial, which included expert witnesses on the religious symbolism and significance of nativity scenes and also a personal view of the nativity scene by the court. The court found that the nativity scene was clearly a religious symbol and that the city's sponsorship of this symbol unconstitutionally violated the tripartite test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), because the nativity scene has a clearly religious purpose, a primary effect of advancing religion and also runs afoul of the "entanglement" test. 525 F. Supp. 1150, 1181.

The Court of Appeals for the First Circuit affirmed. *Donnelly* v. *Lynch*, 691 F.2d 1029 (1st Cir. 1982). While the First Circuit held that the proper yardstick of the government's conduct is not the tripartite test of Lemon v. Kurtzman, applied by the district court, but rather the "strict scrutiny" test applicable when government discriminates among religions, *Larson* v. *Valente*, 456 U.S. 228 (1982) (striking state tax exemptions which distinguished between religious organizations according to size), the court of appeals held that under either test, the governmental ownership and sponsorship of a nativity scene depicting the biblical birth of the Christian Messiah cannot pass constitutional muster.

This Court granted *certiorari* on the first amendment issues raised.

The nativity scene, challenged by plaintiffs, is set up in approximately 140 square feet (J.A. 45) of the lower center of a privately owned area known as Hodgson Park (J.A. 35, 59) which is located close to the Pawtucket City Hall (J.A. 14).

The nativity scene display is set up, maintained and dismantled by city employees, or city-paid contractors (J.A. 30, 32, 35) under the supervision of the city's Director of Parks and Recreation (J.A. 29). All lights, figures and buildings that make up the display are owned by the city (J.A. 33), and the city reimburses the private owner of the park for all the electricity used (J.A. 34, 38).

The city-owned nativity scene (J.A. 33) encompasses a space of 14 feet by 10 feet, and depicts the birth of Jesus in life size figures (J.A. 13, 51). There are approximately twelve statues ranging from 12 inches to five feet high (J.A. 51). These figures include the baby Jesus which is 12 inches long lying inside straw in a manger which is about five feet high (J.A. 13). The baby is surrounded by statues which include Mother Mary and Saint Joseph, in a kneeling position. Other characters depicted in the city's nativity scene are the three kings, three shepherds in a kneeling position, various animals and two angels (J.A. 52).

INTRODUCTION

At issue is the constitutionality of the city of Pawtucket's sponsorship of a nativity scene depicting the birth of the Christian Messiah, Jesus, according to the Christian biblical tradition.

The issue is a narrow one. Not at issue is the right of a private group to display a nativity scene in a private park. Also not at issue is the right of a private group to display a nativity scene in a public park. Further, the nativity scene is the only portion of the Pawtucket Christmas display challenged. No other symbols of Christmas in the Pawtucket display, *i.e.*, the lights, trees, reindeer, Santas, wishing wells, carolers, or stars are at issue (J.A. 4, 43, 44). While the issue is narrow, this case poses a serious constitutional problem.

Jews in the United States are members of a minority religious group. Like other minority religious groups that were persecuted on religious grounds abroad, Jews came to the U.S. to escape religious discrimination that flourished in countries where governments endorsed a majority or state religion. To avoid such

treatment here, the Founding Fathers inserted in the Bill of Rights the first amendment limitation on the government's power to make any laws respecting an establishment of religion. It is this establishment clause of the first amendment which has afforded minority religious groups, in the United States, the opportunity to live in religious freedom, free of threats from a religious majority which might seek to impose its religious views or practices on minorities through government action or sponsorship. Today it is this principle which is threatened.

Cases nationwide challenging the city or state government display of nativity scenes reflect the concern of many Americans with state support or advancement of a particular religion.[1]

May a city own, maintain, and display a nativity scene depicting the birth of the Christian Messiah, Jesus? *Amici* submit that it may not do so within the purview of the first amendment to the Constitution. For the city sponsorship of a nativity scene raises the very danger which the establishment clause was designed to prevent. This occurs because the government sponsorship of a nativity scene depicting the miraculous birth of the Christian Messiah constitutes a twofold establishment. First, it is an establishment of religion because the nativity scene is very clearly a religious symbol, the display of which has the purpose and effect of advancing religion. *Amici* argue this effect is most pronounced among the children of minority religions. Second, because the nativity scene depicts the birth of the Christian Messiah, its display by a government instrumentality is the display of a Christian religious symbol, in recognition, celebration and commemoration

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1. To date these include: *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973); *McCreary* v. *Stone*, No. 83-0987 (S.D.N.Y. filed Feb. 7, 1983); *Ahlburn* v. *Cianci*, No. 82-801 (D.R.I. filed Dec. 17, 1982); *Citizens Concerned for Separation of Church and State* v. *Denver*, 508 F. Supp. 823 (D. Colo. 1981); *Citizens Concerned for Separation of Church and State* v. *Denver*, 481 F. Supp. 522 (D. Colo. 1979), *appeal dismissed*, 628 F.2d 1289 (10th Cir. 1980), *appeal docketed*, No. 82-1022 (10th Cir. 1982); *Russell* v. *Town of Mamaroneck*, 440 F. Supp. 607 (S.D.N.Y. 1977); *Conrad* v. *Denver*, ___ Colo. ___, *656 P.2d 662 (Sup. Ct. Colo. 1983) (en banc)*; Lawrence v. Buchmueller, 40 Misc. 2d 300, 243 N.Y.S.2d 87 (Sup. Ct. 1963); *Baer* v. *Kolmorgen*, 14 Misc. 2d 1015, 181 N.Y.S.2d 230 (Sup. Ct. 1958).

of a religious event. This government action prefers the belief of one religion over another, thus, creating an establishment of a particular religion — the Christian religion.

By this brief, *amici* seek to explain the nature of Pawtucket's nativity scene and to show why this scene is the religious symbol, beyond all symbols, whose sponsorship by the Pawtucket city government sends a clear message of isolation to Jewish citizens. This occurs because the Pawtucket nativity scene is a symbol of the divinity of the birth of Jesus, the Christian Messiah, which throughout the ages has highlighted the historic difference between Jews and Christians — failure by Jews to accept Jesus as the Messiah. Recounting the birth of the Christian Messiah, the nativity scene evokes the question that has "haunted Jewish-Christian relations for nearly two milennia. . . . What were their [the Jews] motives for rejecting the messianic claims made about Jesus." C.Y. Glock & R. Stark, *Christian Beliefs and Anti-Semitism* 50 (1966). Because the nativity scene is the symbol of this gulf between Christians and Jews, Pawtucket's sponsorship of the nativity scene, *amici* argue, has caused and will only serve to further cause divisiveness in the community. This divisiveness, should the nativity scene continue to be city-sponsored, will lead to increasing government entanglement in religion as competing religious groups will seek to have government endorsement of their religious symbols. To avoid this spectre, *amici* here submit that this Court should affirm the decisions below disallowing a city-sponsored nativity scene in Pawtucket.

ARGUMENT

I.

The Pawtucket Nativity Scene is a Fundamental Christian Religious Symbol

The religious symbolism and significance of the Pawtucket nativity scene is beyond serious dispute. It is demonstrated by the district court findings in this case, the history of the nativity scene, community perceptions and case law. The district court held,

525 F. Supp. at 1166, that the nativity scene, which depicts the birth of Jesus, is a religious symbol because it does not depict the birth as a mere historical fact, but rather combines history and faith — faith that Jesus' birth was miraculous, and that Jesus is the Son of God and that he was the Messiah sent to earth to save mankind. This faith is not shared by non-Christians. Through poses and facial expressions of the statues showing "a sense of awe and worship," the district court found that the figures of the nativity scene show that the baby in the manger is not a mere baby, but rather, divine. 525 F. Supp. at 1166.

> In sum, the court does not understand what meaning the creche, as a symbol, can have other than a religious meaning.
>
> * * * *
>
> [U]nlike stars, or bells, or trees, the creche is not a common, ordinary subject that attains a religious dimension only if the viewer understands that it is intended to connote something more than its facial significance, and possesses the key to unlock that secondary meaning. The creche is more immediately connected to the religious import of Christmas because it is a direct representation of the full Biblical account of the birth of Christ.

525 F. Supp. at 1167.

Not only did the district court find that the nativity scene is a religious symbol, the court clearly stated that the symbol is a Christian one. "It is the embodiment of the Christian view of the birth and nature of Christ." 525 F. Supp. at 1167. In its affirmation of the district court's holding the nativity scene unconstitutional, the court of appeals specifically found that the district court's assessment that the nativity scene is a religious symbol was correct. 691 F.2d 1029, 1031-33. Use of this religious symbol, the court of appeals found "is an act which discriminates between Christian and non-Christian religions." 691 F.2d 1029, 1034.

The district court's finding that the nativity scene is a religious symbol should be affirmed by this Court because it is based on the district court's three-day trial, including a personal court view of

the Pawtucket nativity scene and numerous witnesses' testimony as to the symbolism, purpose and effect of the nativity scene on them and upon members of the community, especially children. Plaintiff Donnelly testified that he viewed the nativity scene "as a religious display depicting the birth of Christ" (J.A. 13). Further, plaintiff Donnelly distinguished the nativity scene from other Christmas decorations. His testimony contrasted the nativity scene with Santa Claus and the Christmas tree which he stated were not religious symbols because unlike the nativity scene, they did not depict a specific religious event (J.A. 18). In addition, the Executive Director of the ACLU testified as to the religious symbolism of the nativity scene (J.A. 19). An expert witness on the effect of symbols on children, Dr. M. Werle, supported these conclusions. He testified that "the nativity scene is a very powerful religious symbol because it is a symbol of worship" (J.A. 75). This symbol stood out in contrast to other Christmas decorations. "Unlike the secularized dimensions of the Christmas celebration[:] the trees, Christmas trees, lights, reindeer, Santa Claus, the nativity scene is clearly a symbol of the worship of Jesus" (J.A. 75).

The district court's holding that the nativity scene is a religious symbol is hardly surprising. It finds ample support in the history of the nativity scene, the perceptions of the community and case law.

While there are many symbols or decorations of Christmas which reflect the secular cultural elements of that holiday, *e.g.*, lights and trees,[2] the nativity scene is a specifically religious Christian symbol, which was introduced by Saint Francis of Assisi in 1224, and incorporated into the Christmas celebration to

2. Christmas is considered by historians to be a combination of celebrations: the date Jesus was born and a number of pagan holidays which fell about the same period in the calendar. These pagan holidays include a Roman feast day on the 25th of December called the Feast of the Birth of the Unconquered Sun, another Roman pagan festival in mid-December in honor of Saturn, the God of seed-corn, and a Norse festival in honor of the sun. The Christmas tree, Christmas light, and mistletoe symbols derive from this pagan element of the Christmas holiday. L.W. Cowie & J.S. Gummer, *The Christian Calendar* 21-22 (1974).

recall and to explain the birth of Jesus. L.W. Cowie & J.S. Gummer, *The Christian Calendar* 22 (1974). The story depicted by the scene is the birth of Jesus as set forth in the Gospels. Specifically the nativity scene describes that portion of the life of Jesus recounted in the Gospel known as the Incarnation — how God became man — including the infancy and childhood of Jesus. G.G. Sill, *A Handbook of Symbols in Christian Art* 68 (1975).

In Christian symbolism, the object of the nativity scene is to depict not the birth of a historical figure, Jesus, but rather the birth of the Messiah. The fact that this birth is a special religious event is shown through the figures representing the Holy Family. "The Christ Child is lying in a manger or upon the straw. The Virgin kneels in adoration before him. Joseph in his wonderment, stands at one side." G. Ferguson, *Signs and Symbols in Christian Art* 45 (1954).

This religiously based depiction of the birth of the Christian Messiah is one of the most fundamental religious symbols to Christians and Jews. For Christians it provides basic religious definition — Christians accept the birth of Jesus as the birth of the Messiah. "The Christian faith. . . is based on the mystery of the Incarnation. . . . The Christian Incarnation means that God was incarnate in the human person of. . . Jesus of Nazareth. . . ."J. Isaac, *The Teaching of Contempt:Christian Roots of Anti-Semitism* 118 (1962). "The most fundamental affirmation of Christian faith is the belief that Jesus is the Christ. . . . On this affirmation everything else in Christian theology is built. To ask about this affirmation is to ask about the keystone of Christian faith." R. Ruether, *Faith and Fratricide - The Theological Roots of Anti-Semitism* 246 (1974).

Just as fundamental to Jewish thought is the "non-incarnation of God." F.E. Talmage, *Readings in the Jewish-Christian Encounter* 281 (1975), citing Martin Buber. "The God in whom [Jews] believe, to whom [Jews] are pledged, does not unite with human substance on earth." *Id.* at 282. Further, Jews believe in the inseparability of the coming of the Messiah with the coming

of the Messianic Age and, thus, cannot accept the Christian conception of Jesus as the Messiah. R. Reuther, *Faith and Fratricide-The Theological Roots of Anti-Semitism* 246-247 (1974).

Emerging from these fundamentally disparate Christian and Jewish beliefs is a basic difference between these two religions concerning the messianic nature of Jesus. It has been described by theologians as part of the "ultimate division between Judaism and Christianity." F.E. Talmage, *Readings in the Jewish-Christian Encounter* 281 (1975), *citing* Martin Buber. This would have remained merely a theological difference if it were not for the reaction, throughout history, to the Jewish non-acceptance of the Christian belief in the Messiah. Discreditation of Jewish beliefs by linking the non-acceptance of Jesus as the Messiah to the punishment of the wandering of Jews, together with forced conversion of Jews, were the historic responses to the Judaic non-acceptance of Jesus as the Messiah. *See Christian Roots of Anti-Semitism, supra,* at 114-115; J.E. Wood, Jr., *Jewish-Christian Relations in Today's World* 98 (1971).

For Jews, government sponsorship of the nativity symbol stands for state endorsement of the most fundamental tenet of Christianity — acceptance of Jesus as the Messiah. This state sponsorship of the most fundamental belief of the Christian religion sends a clear message of rejection to Jewish citizenry, other non-Christian religious groups, and non-believers who do not share the religious beliefs of the majority.

There is nothing more fundamental in the first amendment than the prohibition against the government sponsorship of any religion. The government may not tell us whom or how or where to worship nor may the government participate in the sponsorship or advancement of any religious belief. In matters of religion, the government must be neutral. It is this neutrality which is violated by Pawtucket's sponsorship of the nativity scene.

The religiosity of the nativity scene inheres in its history. It is clear to the Christian and Jewish communities just as it was clear to the district court. Further, the district court's finding is in

accordance with the first amendment standard concerning religious symbols. In *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973), the court of appeals held that the creche is "obviously a religious symbol." 495 F.2d at 69.

In a case involving a similar religious display, *Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam), this Court held that posting the Ten Commandments, privately purchased, on the walls of public school classrooms violated the first amendment. Central to the Court's determination of unconstitutional religious purpose under the first prong of the *Lemon* v. *Kurtzman* tripartite test, 403 U.S. 602, 612-613 (1971), was the religious nature of the Commandments themselves.

Notwithstanding the presence of a disclaimer on the posted Commandments stating that they had a "secular application" as the "fundamental legal code of Western Civilization and the Common Law of the United States," 449 U.S. 39, 41 (1980), the Court held that:

> [T]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths. . . . The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. *See* Exodus 20:12-17; Deuteronomy 5:16-21. Rather, the first part of the Commandments concerns the religious duties of believers. . . .

449 U.S. 39, 41-42.

Insofar as the nativity scene is undeniably sacred in content for the Christian faith, and its subject matter is concededly not even "arguably secular," it meets the standard for religious symbolism set forth in *Stone* v. *Graham*. Unlike the Ten Commandments which at least have some secular application insofar as they are in fact incorporated, to a significant degree, in legal codes, the nativity scene depicts the birth of the Christian Messiah in a way that is, in the language of the district court "the embodiment of the

Christian view of the birth and nature of Christ." 525 F. Supp. at 1167. The nativity scene is primarily, if not entirely, religious in nature and its display clearly serves a religious purpose.

Further, unlike the Ten Commandments which emanate from both the Christian and Jewish religions, the nativity scene depicts the birth of Jesus according to the Christian view — set forth in the Gospels of the New Testament, thus, the nativity scene is not only a religious symbol but a Christian symbol.

Similar to the nativity scene is the cross, the universal symbol of the Christian religion. *See* L. Pfeffer, *God, Caesar and the Constitution* 341 (1975). In *ACLU* v. *Rabun County*, 698 F.2d 1098 (11th Cir. 1983), in considering the constitutionality of a lit up cross set up in a Georgia park, the Court of Appeals for the Eleventh Circuit held "[s]ubstantial evidence supports the district court's finding that the latin cross is a universally recognized symbol of Christianity." 698 F.2d 1098, 1103. The court further found that the Georgia state government had the burden under the establishment clause to articulate a secular purpose to justify erecting the cross, because in allowing a lit cross in the state park it had permitted "religious symbols to be constructed on public property." 698 F.2d at 1110.

Despite the coincidence of district court findings, appellate affirmation, history, community beliefs and case law concerning the religiosity of the nativity scene, petitioners claim that it is secular and compare Pawtucket's sponsorship of the nativity scene to statutory Sunday closing laws. *See* Brief of the Petitioners at 10. The two could not be more different. While Sunday closing laws had their origins in religious purpose, then and now, these statutes regulated a secular activity — work. *See Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961). "The present purpose and effect of most of them [Sunday closing laws] is to provide a uniform day of rest for all citizens." *McGowan* v. *Maryland*, 366 U.S. 420, 445 (1961). The only religious aspect to closing law regulation is the indirect benefit to religion because the statutory day of rest coincides with the religious day of rest. This indirect benefit to religion of the Sunday closing laws was likened by this

Court, in *McGowan* v. *Maryland*, to the indirect benefit to religion occasioned by the statutory prohibition of murder which coincides with the same prohibition in the Ten Commandments. *Id.* at 442.

In contrast, the Pawtucket nativity scene does not have a secular purpose and, thus, provides more than an incidental benefit to religion. As found by the district court, the nativity scene solely has a religious function, *Donnelly* v. *Lynch*, 525 F. Supp. 1150 (1981), *see* this brief, *supra*, at 8-10, to recall the birth of the Christian Messiah, recognition of which is a basic tenet of Christianity. Thus, it is a symbol whose government sponsorship excludes religious groups which do not share the belief in that Messiah, such as the Jewish people. The isolation and divisiveness caused by city endorsement of this symbol is exactly what the establishment clause sought to prevent.

II.

City Sponsorship, Ownership and Maintenance of the Pawtucket Nativity Scene is Unconstitutional Under the Establishment Standard of the First Amendment: The City is by its Actions Advancing Religion, Preferring One Religion Over Others and Violating the Religious Neutrality Required of Government by the Establishment Clause

Pawtucket's sponsorship of a religious denominational symbol is not only advancing religion but a preference for the Christian religion. As a twofold establishment, the Pawtucket sponsorship of a nativity scene impermissibly contravenes constitutional standards governing discriminatory preference of religion, *see Larson* v. *Valente*, 456 U.S. 228 (1982) (striking Minnesota statute according tax exemptions to religious organizations preferentially) and constitutional standards limiting the government establishment of any religion. *See Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971).

In affirming the district court's holding of unconstitutionality, the court of appeals went beyond finding the nativity scene unconstitutional as an establishment of religion and found that, because

the nativity scene depicted the birth of the Christian Messiah and, thus, constituted an aid to the Christian religion, Pawtucket sponsorship of the nativity scene was a granting of a denominational preference to a specific religion — Christianity. "[T]he City's ownership and use of the nativity scene is an act which discriminates between Christian and non-Christian religions." *Donnelly* v. *Lynch*, 691 F.2d at 1034. Relying on Larson v. Valente, where this Court declared "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," 456 U.S. at 244, the court of appeals held that under the establishment clause, the appropriate standard of review for government action affording a benefit which discriminates among religions was not the tripartite test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), used by the district court below, but rather the strict scrutiny test which is applied in fourteenth amendment discrimination review. *See Larson* v. *Valente*, 456 U.S. at 251.

Under this standard, the court of appeals found that the nativity scene did not survive the test of strict scrutiny which requires invalidation of discriminatory government preferences to religion unless the preference at issue "is justified by a compelling governmental interest" and "is closely fitted to further that interest." *Donnelly* v. *Lynch*, 691 F.2d at 1034, *citing approvingly Larson* v. *Valente*, 456 U.S. at 248. According to the court of appeals, the nativity scene unconstitutionally violated this test, because there was no finding below of any legitimate secular purpose for inclusion of the nativity scene in the government-sponsored display. Given that there was no legitimate secular purpose, the court of appeals held that *a fortiori* there was no compelling government interest in displaying the nativity scene. 691 F.2d at 1035, *citing* 525 F. Supp. at 1173. Further, the court of appeals' determination that the Pawtucket nativity scene constituted an establishment of religion which preferred the Christian religion over others incorporated the determination of the district court that the nativity scene constituted an establishment of religion. Under the tripartite test employed by the district court, applicable to

establishment of religions, *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), the evidence showed that the nativity scene unconstitutionally violated all three prongs. 525 F. Supp. at 1168-1181. The three-pronged test applied for over a decade by this Court to delineate the demarcation between church and state required by the first amendment's establishment clause provides:"[T]o pass muster under the Establishment Clause the law in question first must reflect a clearly secular legislative purpose. . . . second, must have a primary effect that neither advances nor inhibits religion. . . and, third, must avoid excessive government entanglement with religion. . . ."*Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 772-773 (1973) (citations omitted).

Pursuant to this three-element test, if even one of these criteria is not satisfied, the state law or practice must fall. *Stone* v. *Graham*, 449 U.S. 39 (1980) *(per curiam)*.

1. The Pawtucket Nativity Scene Does Not Reflect a Clearly Secular Purpose

In *Stone* v. *Graham*, 449 U.S. 39 (1980) (per curiam), this Court considered the purpose behind the posting of a copy of the Ten Commandments on the wall of public classrooms in Kentucky. Central to this Court's determination of invalid purpose was the religious nature of the Ten Commandments. The religiosity of the symbol posted on the wall, this Court found, overcame contrary statements of secular purpose. "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Stone* v. *Graham*, 449 U.S. at 41.

Similarly, as discussed at Point I of this brief, the Pawtucket nativity scene which depicts the birth, as recounted in the Gospels, of the Christian Messiah, Jesus, is so religious in nature that

the burden of showing a clearly secular purpose falls upon Pawtucket.[3] *See Stone* v. *Graham*, 449 U.S. at 41. Here, as found by the court below, Pawtucket failed to meet that burden.

On the basis of evidence before it, including testimony by the city of Pawtucket (J.A. 91-115), the district court found that the purpose of the city in displaying the nativity scene is to support the religious image which the symbol expresses — the celebration of the birth of the Christian Messiah.[4] *See Donnelly* v. *Lynch*, 525 F. Supp. at 1174. This conclusion of the nativity scene's religious purpose overcame, the court found, the city's allegations of contrary purpose. In particular, the city claims that the purpose of the nativity scene is not religious. Rather, the city alleges, the purpose is merely to use a "passive" display to "acknowledge" the "nativity theme in the holiday tradition." Brief of the Petitioners at 10.[5] Such "passive acknowledgement" by government of the nativity theme, the city claims, "is not an establishment of religion." Brief of the Petitioners at 21. According to the city,

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3. *Amici* do not claim that the nativity scene is so religious that it is per se unconstitutional. Indeed, both the district court and appellate decisions recognized that despite the religious symbolic nature of the nativity scene there could be situations where the nativity scene would not be unconstitutional. 525 F. Supp. at 1168, 1169, *cited in* 691 F.2d at 1035 n. 5, if the purpose for the display of the scene was clearly secular. Examples cited by the district court and affirmed by the court of appeals were the government use of a nativity scene as part of a museum display, 525 F. Supp. at 1169, or in an educational context, id. at 1177 n. 38, *cited approvingly in* 691 F.2d at 1035 n. 5.

4. The city argues that the religious purpose of the nativity scene is in some way mitigated by its context in this case. *See* Brief of Petitioners at 25. Even if one were to consider the nativity scene within the entire display, its purpose far from mitigated, rather is highlighted. The presence of the nativity scene, a religious symbol, as a part of a city-sponsored Christmas celebration demonstrates that the city is celebrating the religious reason for Christmas — that is the celebration of the birth of Jesus, the Christian Messiah, as the birth is recounted in the Gospels. As found by the court below, this religious context supports the religious meaning of the nativity scene. "[T]he City has placed the creche in a setting *supportive* of its meaning." 525 F. Supp. 1150, 1177 (emphasis in original).

5. Other ostensible purposes for the nativity scene, according to the city, are for community morale (J.A. 106) and to further cultural, traditional, aesthetic, economic and accessibility objectives (J.A. 109-110).

the establishment test provides that "if the context is secular and the accommodation to religion is passive, the test of neutrality has been met." Brief of Petitioners at 14.

By using terms like "passive display," "acknowledgement" and "accommodation," to describe their sponsorship of the nativity scene and citing to cases such as *McGowan* v. *Maryland*, 366 U.S. 420 (1961), and *Zorach* v. *Clauson*, 343 U.S. 306 (1952), the city attempts to cast this case as one involving free exercise issues. Brief of Petitioners at 14; *Amicus* Brief of the Solicitor General at 3. However, no free exercise is involved. No free exercise claim was made by Petitioners in their briefs below. Elimination of the city's sponsorship of the nativity scene would in no way violate the free exercise rights of those Pawtucket citizens who wish to celebrate Christmas. Indeed, the instant case could not be more different than the "accommodation" cases relied upon by Petitioners. For example, in *Zorach* v. *Clauson*, at issue was the question of whether New York public schools could constitutionally release students from school to attend religious classes held elsewhere. The purpose of the "released time" program in *Zorach* was clear — permitting students to leave the public schools to participate in religious events elsewhere was deemed an "accommodat[ion] [of] the public service to their spiritual needs." *Zorach* v. *Clauson*, 343 U.S. 306, 314. In so holding this Court was quick to distinguish what was not permissible:

> Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person.

343 U.S. at 314.

Pawtucket's use of public funds to sponsor the nativity scene display for teaching the story of the birth of the Christian Messiah falls into this impermissible category recognized by the *Zorach* Court. Thus, this type of sponsorship of a religious activity may be compared for analytic purposes not to *Zorach*, where government only permitted students to leave the schools for religious reasons, but rather to *McCollum* v. *Board of Education*, 333

U.S. 203 (1948), where the state did not merely seek to release students for religious study but rather sought to allow religious instructors to come on to the public school campus to teach. In light of the active government sponsorship found in *McCollum* and absent in *Zorach*, this Court found that the active government sponsorship in *McCollum* violated the first amendment's establishment clause.

In *McCollum*, this Court found that the government stepped beyond the accommodation of religious beliefs provided for in the *Zorach* "released time" program to active sponsorship of these beliefs. Similarly, in the instant case Pawtucket has gone beyond the mere accommodation of celebration of Christmas beliefs to active sponsorship of that celebration. Mere accommodation of Christmas occurs when citizens have time off so as to permit them to celebrate the holiday. Thus, the United States government has made Christmas a national holiday to accommodate the religious needs of the majority of its citizenry. 5 U.S.C. § 6103. As in *Zorach*, this time off from work, like the time off from school, allows persons to engage in religious activities. However, that is all it does. The existence of the national holiday does not cross the parameters of accommodation set forth in *Zorach*. In contrast, the Pawtucket celebration, by sponsoring the nativity scene depicting the birth of Jesus, like the school in *McCollum*, aids religion in the dissemination of doctrine in violation of the establishment clause. As declared by this Court in *McCollum*, to hold that a state may not:

> aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not... manifest a governmental hostility to religion or religious teachings.... For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.

333 U.S. at 211-212.

The intermingling of these respective spheres was found by the district court below. The court listened to all of the testimony

before it, rejected the putative secular purposes before it advanced by Petitioners and determined that the purpose of the city of Pawtucket in sponsoring this nativity scene was religious and, therefore, unconstitutional. The court of appeals upheld this finding. There is no basis for disturbing that determination by this Court.

2. *The Primary Effect of the Pawtucket Nativity Scene is to Advance Religion*

In addition to the Pawtucket nativity scene's religious purpose, its direct and immediate effect is to advance religion. This violates the second element of the establishment clause test. *See Committee for Public Education* v. *Nyquist*, 413 U.S. at 773. The effect inquiry examines whether the state has placed its imprimatur upon religious activity. *See Abington* v. *Schempp*, 374 U.S. at 216-219.

Traditionally this Court's scrutiny of the government's role with respect to religious activity has been very strict. Even where the effect consists merely of a "symbolic benefit" to religion in the minds of the public, this Court has held that this suffices to invalidate the statute under the establishment clause. *See Larkin* v. *Grendel's Den*,__U.S.__, 51 U.S.L.W. 4025 (Dec. 13, 1982), where this Court held unconstitutional a statute giving governing bodies of schools and churches the power to prevent issuance of liquor licenses within a 500-foot radius of their church or school. This Court explained that "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." 51 U.S.L.W. at 4028.[6]

6. Furthermore, government action may be unconstitutional even if its religious effect is not the primary effect. In *Committee for Public Education* v. *Nyquist*, this Court held that government programs with direct religious effects were unconstitutional, regardless of whether such effects were less substantial than the secular effects of the programs. Even the "mere possibility" of an effect which advances religion is constitutionally impermissible. 413 U.S. at 783 n. 39, *citing Tilton* v. *Richardson*, 403 U.S. 672, 683 (1971) (plurality decisision that the

Here, the district court, as affirmed by the court of appeals, 629 F.2d at 1035, found that the Pawtucket nativity scene had the unconstitutional effect of advancing religion. 525 F. Supp. at 1178. Moreover, in recognition of the twofold establishment problem inherent in the Pawtucket nativity scene, the court found that the effect of the nativity scene was to advance a particular religion — Christianity.

> [T]he creche conveys more than a remote and incidental benefit on Christianity. By using a religious symbol in a seasonal celebration of a holiday having religious significance for some groups, the City has given those groups special status. It has singled out their religious beliefs as worthy of particular attention, thereby implying that these beliefs are true or especially desirable. . . . Moreover, Pawtucket's use of the creche encourages in its citizens the belief that the Christian majority has the right to have "its" government reflect and express the religious beliefs that the majority regards as important.

525 F. Supp. at 1178.

This double effect recognized by the district court is, for *amici*, the crux of the problem with the Pawtucket nativity scene. For minority religious groups, the effect of seeing government sponsorship of a particular religious symbol which is essentially a teaching aid for the story of the birth of that religion's savior, *see* this brief, *supra*, at 8-10, is inestimable. The message sent out to the community is that there is a coincidence of government with certain religious beliefs, to the exclusion of those citizens who do not share those beliefs.

> When a city so openly promotes the religious meaning of one religion's holidays, the benefit reaped by that religion and the disadvantage suffered by other religions is obvious. Those persons who do not share those holidays are

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mere possibility of a federally financed structure being used for religious purposes 20 years hence was constitutionally unacceptable because the grant might "in part have the effect of advancing religion").

> relegated to the status of outsiders by their own government; those persons who do observe those holidays can take pleasure in seeing the symbol of their belief given official sanction and special status. . . .

Fox v. *City of Los Angeles*, 22 Cal. 3d 792, ____, 587 P.2d 663, 670 (1978) (Supreme Court of California striking as unconstitutional defendant city's illuminated cross on its City Hall).

In addition to this twofold effect of advancing a particular religion, the instant nativity scene has a heightened effect with respect to children. The nativity scene's location in a Christmas display, which is largely designed to attract children through wishing wells, Walt Disney characters and Santa Claus giving out free candy, draws to the nativity scene, which is a religious symbol, an audience which is particularly vulnerable to religious influences — school children. This special vulnerability of school children has been recognized by this Court in a long line of decisions, *see, e.g., Abington* v. *Schempp*, 374 U.S. at 212-213; *Engel* v. *Vitale*, 370 U.S. 421, 434 (1962); *Zorach* v. *Clauson*, 343 U.S. 306, 312-313 (1952).

Given the recognized vulnerability of children to religious influences, this Court has accorded to children heightened protection from such influences. *See Marsh* v. *Chambers*, ____ U.S. ____, 51 U.S.L.W. 5162, ____, slip op. at 8-9 (July 5, 1983) (adults unlike children not readily susceptible to religious indoctrination or peer pressure); *Widmar* v. *Vincent*, 454 U.S. 263, 274 n. 14 (1983). In the instant case, pursuant to the heightened scrutiny required when school children are the audience, this Court must invalidate the nativity scene because of its effect of advancing religion. As testified to below, the impression upon a child of a religious symbol in the midst of the city-sponsored display could be substantial:

> For a child to be involved with the Pawtucket display, the lights, Santa, everything that is just absolutely seductive to the interests of a child the child will notice every part of it and will remember it for a long time. . . .

(J.A. 80).

The consequences of this impression are damaging chiefly to the child of a minority religious group. It is this child that will encounter a conflict between the attractions of the display and the religious message inherent in the nativity scene. Such a display thus places the burden upon the parents of the minority child to explain the religious symbol and to attempt to disassociate the imprimatur of the city government from the religious symbol (J.A. 83). This effect of the Pawtucket nativity scene underscores the unconstitutionality of government sponsorship of religious displays.

3. *The Pawtucket Nativity Scene Excessively Entangles the State With Religion*

To pass establishment clause muster, a statute must not only satisfy the requirements of secular purpose and effect, but must also avoid the creation of excessive government entanglement with religion. *Nyquist*, 413 U.S. at 773; *Lemon* v. *Kurtzman*, 403 U.S. at 612-613; *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970).

While Pawtucket's nativity scene does not involve "administrative" entanglement between government and religious organizations, *see Donnelly* v. *Lynch*, 525 F. Supp. at 1179, the district court found that entanglement between government and religion is engendered by the nativity scene, from the divisiveness in the community generated by competing efforts to gain the support of government. *Donnelly* v. *Lynch*, 525 F. Supp. at 1179, *citing Committee for Public Education* v. *Nyquist*, 413 U.S. at 796, *quoting Everson* v. *Board of Education*, 330 U.S. 1, 8-9 (1947). This "political fragmentation and divisiveness" was one of the principal evils against which the first amendment was intended to protect. *See Lemon* v. *Kurtzman*, 403 U.S. at 624. *Cf. Mueller* v. *Allen*, ___U.S.___, 51 U.S.L.W. 5050, 5054 n. 11 (June 29, 1983) (political divisiveness inquiry is confined to cases where there is direct financial sponsorship by government). Here, evidence of

fragmentation and divisiveness as a result of the Pawtucket nativity scene's religious nature is abundant. The district court found that "the atmosphere has been a horrifying one of anger, hostility, name calling and political maneuvering. . . ." 525 F. Supp. at 1180.

Beyond the divisiveness in the Pawtucket community, there is evidence that nationwide, the expression by government of sectarian symbolism carries with it an inevitable potential for divisiveness. This divisiveness is revealed by the sheer number of cases across the country questioning the government-sponsored nativity scene.[7]

In one community, Scarsdale, a suburb of New York, a village nativity scene has been the center of conflict for 23 years. "Voices of dissent emerged as early as 1960 when . . . the Jewish community was distressed by religious displays on public property and the injection of religious matter in public affairs.... Over time, however, the creche generated more and more controversy in the community." Plaintiffs' Pre-trial Memorandum at 8, *McCreary* v. *Stone*, No. 83-0987 (S.D.N.Y. 1983) (awaiting decision).

This divisive effect upon the Scarsdale community together with the similar effect found by the district court in Pawtucket illustrate the inevitable dangers inherent in the government sponsorship of sectarian symbols. Because such sponsorship constitutes a twofold establishment, preferring one religion or another, it automatically pits different religious groups against each other. While the apparent losers are the minority religious groups (of

7. To date these include: *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973); *McCreary* v. *Stone*, No. 83-0987 (S.D.N.Y. filed Feb. 7, 1983); *Ahlburn* v. *Cianci*, No. 82-801 (D.R.I. filed Dec. 17, 1982); *Citizens Concerned for Separation of Church and State* v. *Denver*, 508 F. Supp. 823 (D. Colo. 1981); *Citizens Concerned for Separation of Church and State* v. *Denver*, 481 F. Supp. 522 (D. Colo. 1979), *appeal dismissed*, 628 F.2d 1289 (10th Cir. 1980), *appeal docketed*, No. 82-1022 (10th Cir. 1982); *Russell* v. *Town of Mamaroneck*, 440 F. Supp. 607 (S.D.N.Y. 1977); *Conrad* v. *Denver*, —Colo.—, 656 P.2d 662 (Sup. Ct. Colo. 1983) *(en banc)*; *Lawrence* v. *Buchmueller* 40 Misc. 2d 300, 243 N.Y.S.2d 87 (Sup Ct. 1963); *Baer* v. *Kolmorgen*, 14 Misc. 2d 1015, 181 N.Y.S.2d 230 (Sup. Ct. 1958).

obvious concern to *amici*) who do not have the numbers to impose their religious symbols on the community, the clear message of the Founding Fathers in the establishment clause is that the whole community loses when government and religion are intertwined. "[A] union of government and religion tends to destroy government and to degrade religion." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962).

To avoid this spectre, this Court must now affirm that the Pawtucket city government sponsorship of the nativity scene is unacceptable entanglement under the establishment clause. Such an affirmance would eliminate only one thing — government sponsorship of the Pawtucket nativity scene. Yet without the prospect of government endorsement, there will be no divisiveness as a result of the nativity scene display. There will be no competition among groups vying for government endorsement. Thus, such an affirmance simplifies the future. The struggle among religious groups for imprimatur places a burden not only upon the executive branch of the government but also upon the courts. For the task of deciding among all the various religious symbols falls upon the courts. Ultimately this Court is the arbiter of which symbols can be displayed in cities and states throughout this country.

In deciding now that this type of decision-making is unacceptable entanglement, this affirmance would send to the American people a clear message that it is the sponsorship by the city that rendered the Pawtucket nativity scene unconstitutional. And from the announcement of that holding, the citizens of Pawtucket and throughout the United States would know that the nativity scenes they see are not government sponsored and, thus, not government endorsed. In this way, a holding affirming the decisions below would address all present and potential nativity scene establishments.

CONCLUSION

For the reasons set forth above, the Anti-Defamation League of the B'nai B'rith and the American Jewish Congress, as *amici curiae* urge affirmance of the judgment of the court of appeals below.

Respectfully submitted,

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No. 82-1256

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS LYNCH, et al.,

Petitioners,

v.

DANIEL DONNELLY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE COALITION FOR RELIGIOUS LIBERTY AND THE FREEDOM COUNCIL, AMICI CURIAE, IN SUPPORT OF THE PETITIONERS

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IN THE

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE COALITION FOR RELIGIOUS LIBERTY AND THE FREEDOM COUNCIL, AMICI CURIAE, IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICI CURIAE[1]

The Freedom Council and the Coalition for Religious Liberty are gravely concerned about the implications for religious tolerance raised by Court of Appeals' decision in this case. Christmas has been observed in America continuously—albeit not universally—from the early days of the first settlement at Jamestown, Virginia. Although the legal observance of the Christmas holiday is not directly challenged here, the Court's disposition of this case will

[1] Counsel of record to both parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

affect many centuries-old American customs and traditions observed as part of the Christmas holiday in thousands of communities in every state of the Union. Moreover, it will affect the display of religious symbols in all aspects of public life.

The Court of Appeals would sanitize public announcement of the Christmas holiday by "shearing it of all its religious trappings." *Donnelly* v. *Lynch*, 691 F. 2d 1029, 1038 (1st Cir. 1982) (Campbell, J. dissenting). The Freedom Council and the Coalition for Religious Liberty are alarmed by the alluring appeal of such extreme logic. The principles of religious tolerance and freedom undergirding the First Amendment Religious Clauses should not be allowed to be undermined by an unrelenting dogma that would eradicate from public life every vestige, root and branch, of America's Judeo-Christian religious tradition.

The Freedom Council is a non-profit corporation organized to defend, restore, and preserve religious liberties guaranteed by the Constitution. With chapters in each of the 50 states, the Freedom Council is also affiliated with student groups on over 70 college campuses and with the Christian Broadcasting Network, currently the largest cable television network in the United States reaching over 20 million homes. The Freedom Council assists its chapters and associated organizations in addressing issues on the local, state and national levels that have a significant impact on First Amendment religious freedoms.

The Coalition for Religious Liberty is a coalition of Jewish, Roman Catholic and Protestant lawyers and lay persons headed by Dr. D. James Kennedy, Senior Minister of the 6,000-member Coral Ridge Presbyterian Church in Ft. Lauderdale, Florida. The Coalition was founded to educate the public on important issues affecting religious

liberties, to support efforts to promote religious liberty and toleration in American life and to oppose the use of law and the court system as a vehicle for imposing secular religion on American society.

Amici Curiae are represented by participating attorneys from The Rutherford Institute, a non-profit corporation named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. Through the efforts of its staff and affiliated local attorneys and lay persons, the Institute undertakes to assist litigants and participate in significant cases relating to First Amendment religious freedoms. Counsel for *Amici Curiae* in this case have specialized in constitutional litigation, including the Religion Clauses of the First Amendment. Counsel John W. Whitehead has served as special constitutional consultant for the Center for Law and Religious Freedom of the Christian Legal Society, and has authored several books and law review articles that focus on interpretation and application of the First Amendment Religion Clauses. The Freedom Council and the Coalition believe the expertise of its counsel will be of assistance to the Court in this case. This brief is filed to provide the Court with the views of *Amici Curiae* on the issues in this case relating to the Establishment Clause of the First Amendment.

STATEMENT OF FACTS

Amici Curiae adopt by reference the facts presented in the Brief filed by petitioner with this Court. It should be emphasized that the creche appeared (1) in the overall context of City-sponsorship of several national holiday celebrations and (2) in the more limited context of one symbol among scores in a display that was part of a series of City-

wide events celebrating the Christmas holiday. The latter display announced the holiday season to business persons and shoppers in the commercial center of the City of Pawtucket. It appeared only temporarily during the Christmas season. It was placed on private property, with the creche situated amidst lighted Christmas trees, reindeer, snowmen, stars, a wishing well, a large lighted sign proclaiming "Seasons Greetings," a Santa's house inhabited by a live Santa and 21 figurines including a clown, dancing elephant, robot and teddy bear. The cost of the creche and costs incurred in connection with its display were *de minimus*, both in comparison to total cost of the several City displays and in comparison to the annual budget of the City. This setting and context are important in determining the purpose and effect of the display under the Establishment Clause of the First Amendment.

THE QUESTIONS TO WHICH THIS BRIEF IS ADDRESSED

This brief is addressed first to the historical background of the Establishment Clause and the record of its Framers on state participation in religious observances and activities, and second to the legal analysis of whether the City's action in fact constitutes a violation of the Establishment Clause.

SUMMARY OF ARGUMENT

This Court has relied in prior cases upon the intent of the Framers of the Bill of Rights for understanding the meaning and reach of the Establishment Clause. The historical record shows that the climate of the revolutionary period was fundamentally religious and favored government accommodation of religious practices. Although the record of the

Framers' observance of Christmas is sparse, perhaps due to wide acceptance of the Christmas holiday among the sects by 1750, there is substantial historical evidence that the Framers actively sanctioned in their official capacities religious observances and activities having a far greater religious impact than the mere display of a creche in the midst of a secular holiday exhibit. The historical evidence regarding the Framers views should not be discarded when, as this Court has recognized, they played such a leading role in shaping the Constitutional guarantees of religious freedom. The Framers would have been appalled that the First Amendment could be utilized to prohibit the practice in question here.

In its determination below, the Court of Appeals erred by applying the wrong standard of review. Departing from the traditional tri-partite test found in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1974), the lower court applied the "strict scrutiny" standard found in *Larson* v. *Valente*, 456 U.S. 228 (1982). The latter standard is inappropriate in this case since *Larson* involved an explicit statutory classification affecting religious groups, whereas no such regime of state regulation or discrimination is present in this case. The fallacy of applying the *Larson* standard to this type of case is that the analysis inexorably leads to an adverse result. The proper standard is the tri-partite test found in *Lemon* which has been applied in other cases involving religious symbols. *See Stone* v. *Graham*, 449 U.S. 39 (1980).

Applying the *Lemon* tests, the creche, as part of the City's Christmas display, serves a secular legislative purpose. The creche and the other symbols in the display are traditional symbols that are part of the historical-cultural celebration of Christmas by the American people. The dominant message, and therefore the primary effect, of the display is not

to advance religion. Instead, the display advances a secular message announcing the Christmas holiday. In this context, there is no Establishment Clause violation. The decision of the Court of Appeals conflicts with both the intentions of the Framers of the First Amendment and with fundamental Constitutional principles and should therefore be reversed.

ARGUMENT

I.

The City's Use Of A Life Sized Nativity Scene As Part Of A City-Sponsored Outdoor Christmas Display Does Not Conflict With The Intentions Of The Framers Of The First Amendment Concerning The Separation Of Church and State.

From the nation's inception, our governments have encouraged and accommodated religion. This is most evident in the history of the revolutionary period and in official acknowledgement of and participation in certain religious observances during the period. There is a wealth of historical data illuminating the meaning of the First Amendment and the intent of the Framers in this regard. The record demonstrates that the Framers participated in and authorized religious observances and activities that had a far greater religious impact than display of the creche by the City. Thus, it is the Court of Appeals decision below, not the display in issue, that conflicts with long-standing First Amendment values.

A. The Climate Of Our Revolutionary Government Was One Of Accommodation To Religion.

From the references to the "Creator" in the Declaration of Independence to the drafting of the First Amendment, it is clear, in the words of the late Judge Charles Fahy, that

"[t]he climate of the American revolutionary period, including the period of constitutional development, was fundamentally religious." Fahy, *Religion, Education and the Supreme Court,* 14 Law & Contemp. Prob. 73, 77 (1949). The focus of the Constitutional era was not the eradication of religion from public life. Instead, it was to ensure that religious values be accommodated without violating private rights of conscience. As Professor Arthur Sutherland has written, the history of church and state reveals "an intimate association between government and religion . . ." Sutherland, *Due Process and Disestablishment,* 62 Harv. L. Rev. 1306, 1318 (1949). Justice Joseph Story, who served on the United States Supreme Court from 1811 to 1845, wrote of this intimate relationship:

> Probably at the time of the adoption of the Constitution, and of the first amendment to it . . . the general if not the universal sentiment in America was, that Christianity ought to receive encouragement by the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. Any attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indigation . . . The real object of the amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

J. Story, 2 *Commentaries on the Constitution of the United States* 593-95 (2d ed., 1851). *See also* T. Cooley, *Principles of Constitutional Law* 224 (1893).

Not only were the Framers concerned that religious expression, freedom and education be accommodated, they saw it as vital to the health of the nation. This was perhaps

most clearly demonstrated in the passage of the Northwest Ordinance of 1787 by a Congress composed of many of the drafters of the First Amendment and the Constitution. It reads:

> No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in said territory. *Religion, morality, and knowledge being essential to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.* (Emphasis supplied.)

Ord. of 1787, July 13, 1787, Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927).

B. The Framers Of The First Amendment Sponsored And Participated In Religious Observances Having A Far Greater Religious Impact Than The City's Creche Display.

Although Christmas was not observed universally in the 13 colonies, it was recognized or observed in both of the earliest Virginia and Massachusetts settlements and was, in the words of dissenting Judge Campbell, "an ingrained part of our culture." *Donelley* v. *Lynch*, 691 F.2d at 1038. The historical record of the Framers' views on the observance of Christmas is sparse, perhaps due to diminishing objections to its observance among the sects by the early to mid-18th Century. R. Meyers, *Celebrations: The Complete Book of American Holidays* 315 (1972). It is clear, however, that the Framers actively participated in official governmental action sanctioning religious observances and activities having a far greater religious impact than the mere display of a creche in the midst of a secular holiday exhibit.

The views of the Framers of the First Amendment are most easily understood by examining legislative proposals offered contemporaneously with the debate and adoption of the First Amendment. For instance, one of the earliest acts of the first House of Representatives was to elect a chaplain. James Madison, sometimes cited as antagonistic toward religion, was a member of the congressional committee that recommended the chaplain system. R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 23 (1982). On May 1, 1789, the House elected as chaplain the Reverend William Linn. Five hundred dollars was appropriated from the Federal treasury to pay his salary.

Washington, as President, issued proclamations calling for observance of Thanksgiving, fasting, and prayer. As a Congressman, Madison endorsed these proclamations. *Id.* at 25-26. Indeed, Congress proposed a joint resolution on September 24, 1789, which was intended to allow the people of the United States an opportunity to thank Almighty God for His many blessings on the American people. *Id.* at 27-29. The resolution requested Washington to announce a day of public thanksgiving and prayer. This proclamation was submitted to the President the very day after Congress had voted to recommend to the states the final text of what was to become the First Amendment to the United States Constitution. President Washington thereafter issued the proclamation. Later, as President, James Madison himself issued four prayer proclamations. *Id.* at 31.

Another notable observance was the divine service that was part of George Washington's inauguration in 1789. By resolution adopted by both houses of Congress it was decided that "divine services" should be held in St. Paul's Chapel in the District of Columbia to be "performed by the

Chaplain of Congress" following administration of the oath of office. P. Stokes and L. Pfeffer, *Church and State in the United States* 87 (Rev. ed. 1964).

Even Thomas Jefferson, who is often cited for his "absolute" commitment to separation of church and state, was not nearly so committed as many who invoke his pronouncements. For example, on October 31, 1803, President Jefferson proposed to the United States Senate a treaty with the Kaskaskia Indians which provided that Federal money be used to support a Catholic priest and build a church for the ministry to the Kaskaskia Indians. The treaty was ratified on December 23, 1803. Explicit appropriation by Congress of funds to support a Catholic priest and a Catholic church could have been avoided by a lump sum appropriation, but Jefferson apparently was not at all reluctant to suggest specific appropriation for a Catholic mission. Cord, *supra,* at 37-39. Jefferson also proposed that religious instruction be offered at the University of Virginia, 19 *The Writings of Thomas Jefferson* 414-17 (Memorial ed. 1904), and served as first president of the school board in the District of Columbia in which the Bible and the Watts Hymnal were used as texts. J. Wilson, *Public Schools of Washington,* 1 Records of the Columbia Historical Society 4 (1897).

The Framers never intended absolute separation of religion and state. Their basic fear was that the Federal government would promulgate a statist ideology and force it upon the citizenry. To say this, however, is not to say that the Framers would have been apprehensive concerning the display of a nativity scene in the midst of a potpourri of well-recognized Christmas symbols. To the contrary, the Framers would have been appalled that the First Amendment could be utilized to prohibit such a practice.

II.

The Court Of Appeals Applied The Wrong Standard Of Review.

It is extraordinary that the Court of Appeals abandoned the traditional tri-partite test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) in favor of the "strict scrutiny" standard found in *Larson* v. *Valente*, 456 U.S. 228 (1982). The latter standard was appropriate in *Larson* because it involved a statute which classified religious organizations and imposed registration and reporting requirements based on "explicit and deliberate distinctions between [such] organizations" *Id.* at 247, n. 23. The Court's "strict scrutiny" analysis, in effect, arose out of an Equal Protection claim involving a suspect classification discriminating among religious groups.

Although "strict scrutiny" may be appropriate for state laws "pregnant with dangers of excessive government direction . . . of churches," *Lemon* v. *Kurtzman*, 405 U.S. at 620, it has no analytical value for this case. The issue here is not whether the City discriminated among or against religions or religious groups, but whether display of a symbol having religious content, in the midst of numerous secular symbols, constitutes an establishment of religion. Cf. *Stone* v. *Graham*, 449 U.S. 39 (1980). The fallacy of applying the *Larson* standard to this type of case is that a "religious discrimination/strict scrutiny" analysis inexorably leads to an adverse result. Even assuming there were a valid governmental interest for displaying a symbol with religious content, it is wholly inconceivable that there could be a "compelling" interest for such a display, let alone "closely fitting" it to further that interest. Indeed, applying strict scrutiny "analysis" to cases involving symbols or ob-

servances would lead to a result clearly rejected by this Court:

> Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

Zorach v. *Clauson*, 343 U.S. 306, 312-13 (1952). The same is true for "In God We Trust" on coinage and currency, religious art on stamps, singing carols at Christmas parties in government buildings, and other symbolic displays having some religious content. As Judge Campbell noted in dissent, "constitutional values are [not] furthered by this kind of thinking." *Donnelly* v. *Lynch*, 691 F.2d at 1038.

The proper standard for review here is (1) whether there is a secular legislative purpose for the governmental practice or activity, (2) whether the principal or primary effect of the involvement is one that neither advances nor inhibits religion and (3) whether there is excessive governmental entanglement with religion. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Stone* v. *Graham*, 449 U.S. 39 (1980). These standards provide reasoned principles by which the impact of the City's actions can be evaluated and properly account for the fact that the "wall of separation" between church and state is at best a "blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman*, 403 U.S. at 614.

III.

The Creche Is Part Of A Cultural-Historical Display Announcing the Christmas Holiday and Does Not Violate the Establishment Clause.

"The purposes of the First Amendment guarantees relating to religion were twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems." *Larkin* v. *Grendel's Den. Inc.*, ___ U.S. ___, 74 L.Ed.2d 297, 304 (1982). Display of the creche in this case does not constitute an establishment of a state religion, nor does it interfere with the practice of religious faiths. The display serves an overriding secular goal of depicting and announcing observance of the Christmas holiday. The religious component of the display represents at most a governmental accommodation, in *de minimus* fashion, of the historical-cultural elements of Christmas as a national holiday.

A. The Creche, As Part Of The City's Christmas Display, Serves A Secular Legislative Purpose.

The City's Christmas celebration and the display in question clearly serve a predominant secular purpose. In context, the creche is one of a group of objects "assembled to show how the American people celebrate the holiday season surrounding Christmas." *Allen* v. *Hickel*, 424 F.2d 944, 949 (D.C. Cir. 1970). Its appearance in the midst of a myriad of other Christmas symbols, some with pagan and some with religious origins, does not constitute state approval or advocacy of religious belief or non-belief. It merely acknowledges the advent of the Christmas holiday as one of many traditional symbols that are part of the heritage of the American people.

The case at bar is remarkably analogous to *McGowan* v. *Maryland*, 366 U.S. 420 (1961). The Sunday Closing Laws in question there had religious origins and in fact contained references to "profan[ing] the Lord's day." The Court nevertheless identified independent secular purposes for such legislation and concluded:

> To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

Id. 366 U.S. 420, 445 (1961).

In *Florey* v. *Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980), a challenge was raised, in part, to the use of religious symbols as a teaching aid or resource in the public schools. The United States Court of Appeals for the Eighth Circuit upheld rules permitting this practice because the symbols were to be displayed temporarily and only as an example of America's cultural and religious heritage. Although the symbols had a distinct religious content, their use in this context served the secular purpose of advancing "the students' knowledge of society's cultural and religious heritage." *Id.*, 619 F.2d at 1314.

This Court's recent decision in *Stone* v. *Graham*, 449 U.S. 39, is not to the contrary. There, the posting of the Decalogue was found to be "plainly religious in nature" because it was displayed separate and apart from an instructional context and was not properly integrated into the school curriculum. In the case at bar, the creche is positioned in the midst of and as part of a comprehensive display acknowledging in symbolic form the celebration of

the American Christmas holiday and not as an object of veneration, worship or private devotion. As such, its display serves a secular purpose and does not transgress the line separating church and state. *See Allen* v. *Hickel,* 424 F.2d 944 (D.C. Cir. 1970); *Allen* v. *Morton,* 495 F.2d 65 (D.C. Cir. 1973); *Citizens Concerned for Separation of Church and State* v. *City and County of Denver,* 508 F. Supp. 823 (D.Colo. 1981); *Citizens Concerned for Separation of Church and State* v. *City and County of Denver,* 526 F. Supp. 1310 (D.Colo. 1981).

B. The Primary Effect Of The Creche, As Part Of The City's Christmas Display, Neither Advances Nor Inhibits Religion.

The primary effect of the City's display of the creche, in the context of the other symbols displayed, is secular. Substantially all of the display of which it is a part contains purely secular symbols. The overall effect of the Christmas display is a secular message that the Christmas holiday is at hand.

The creche, as with secular Christmas symbols such as Santa Claus and reindeer, has been absorbed into the American culture. As such, it represents a traditional aspect of the national history associated with Christmas. "It is seen in department stores, commercial establishments as well as in public places to symbolize the celebration of Christmas, a national holiday." *Allen* v. *Morton,* 333 F. Supp. 1088, 1093 (D.D.C. 1971). In many respects, "the nativity scene has become integrated into our culture and heritage." *See Allen* v. *Morton,* 495 F.2d at 73-74; *Citizens Concerned for Separation of Church and State* v. *City and County of Denver,* 508 F. Supp. at 828; *Florey* v. *Sioux Falls School District,* 619 F.2d at 1316.

The location and setting of the display in which the creche is a part is also relevant. The display is located on private property. Two major retail establishments are located across streets adjacent to the display. Local merchants, who are dependent on Christmas retail activity, actively support maintenance of the display. The costs associated with the display are insubstantial and no different from those incurred for similar holiday displays. Cf. *O'Hair* v. *Andrus*, 613 F.2d 931, 933 (D.C. Cir. 1979). All of these factors highlight the secular backdrop of the display.

In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court emphasized the importance of analyzing the overall context of a state practice to determine whether its primary effect is to advance religion. In that case, the State of Missouri argued that use of facilities on the University of Missouri at Kansas City for religious worship and speech violated the Establishment Clause. This Court found that absent evidence of *domination* of university facilities by religious groups, advancement of religion would not be the primary effect of opening facilities for use by all groups. The Court noted that "the provision of benefits to so broad a spectrum of groups is an important index of secular effect" *Id.* at 274. The reasoning of *Widmar* thus highlights that the overall context of a state practice is directly relevant in determining its the primary effect. Here, even with the religious content of the creche, the prevailing message and setting of the Christmas display, and therefore its primary effect, was secular in nature.

The fact that the creche may offend the religious sensibilities of some citizen or citizens does not *ipso facto* imply endorsement by the City of the Christian religion. "While government must be sensitive to the religious beliefs or disbeliefs of its citizens, it is not required to abandon

common sense." *Citizens Concerned for Separation of Church and State* v. *City and County of Denver,* 508 F. Supp at 830. Taking the overall context of the display into account, the religious impact is greatly diluted, if not emasculated, by the secular elements. The religious impact of the nativity scene is remote and incidental, "significantly subordinated to a predominant secular message of entertainment and nonsectarian celebration." Comment, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education,* 91 Yale L.J. 1196, 1213 (1982).

C. There Is No Entanglement Issue In This Case.

The Court of Appeals itself recognized the weakness of district court's finding of unconstitutional entanglement. It explicitly refused, in its words, "to place much weight on the court's determination that the City's actions risked political divisiveness along religious lines." *Donnelly* v. *Lynch,* 691 F.2d at 1035. Political divisiveness, alone, does not form a basis to invalidate governmental action involving religious activity. *Id.* Moreover, divisiveness on religious lines is not intensified by the Christmas display itself because of its primarily secular nature. *See Citizens Concerned for Separation of Church and State* v. *City and County of Denver,* 526 F. Supp. at 1315. Most important, there is a notable absence of relationships or continuing contacts between the City and religious groups that could cause the administrative entanglement concerns found in *Allen* v. *Morton,* 495 F.2d 65 (D. C. Cir. 1973). In sum, the case is free of any entanglement concerns.

CONCLUSION

Clearly, "[t]he purpose of the establishment clause was not to extirpate religion from public life." Comment, *Secularism in the Law: The Religion of Secular Humanism,* 8 Ohio N.U.L.Rev. 329 (1981). The mind frame of those who directed the constitutional era and the drive toward separation of church and state "was, in some respects, anti-clerical, as a result of Papism, Cromwellism, etc., but never antireligious, so that some interrelating and intermeshing of state and religion have always been with us." Forkosch, *Religion, Education, and the Constitution—A Middle Way,* 23 Loyola L.Rev. 617, 632 (1977).

The Framers sought to avoid the kind of hostility found in this case by accommodating the religious interests of the people. There was no intention on the part of the Framers to censor or eradicate religion from public life. And such has never occurred. The rule of separation that the Framers had in mind when they drafted the First Amendment was to be implemented in a climate of accommodation and benevolence, not of hostility toward religion.

The Court of Appeals' decision runs contrary to this central historical and political truth. It is, as the dissent points out, "an act of censorship against the holiday itself." *Donnelly* v. *Lynch,* 691 F.2d at 1038, n.1 (Campbell, J. dissenting). It amounts to a *de facto* establishment of what this Court has previously identified as a "religion of secularism." *School District of Abington Township* v. *Schempp,* 374 U.S. 203, 225 (1963). *See also* Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development,* 81 Harv. L.Rev. 513, 586-587 (1968) and *Torcaso* v. *Watkins,* 367 U.S. 488, 495, n.11 (1961). As Harvard professor Harvey Cox has noted, secularism is an "ideology, a new closed world view which functions very much like a new

religion. . . . It is a closed ism." H. Cox, *The Secular City* 18 (1965). It is a menace to freedom because it "seeks to impose its ideology through the organs of the State." *Id.*

Not only is the reasoning of the lower courts a departure from long-standing First Amendment values, it is fallacious on its face. The courts below would outlaw official "display" of an ancient symbol depicting the historical and religious roots of the Christmas holiday, but would permit official "observance" of the holiday itself, named for and commemorating the birth of Jesus Christ. This logic is not only specious, it produces an absurd result. As Judge Leventhal observed in *O'Hair* v. *Andrus*, 613 F.2d at 937, "[t]he Establishment Clause is not an abstraction in logic. It permits an accommodation in furtherance of the spirit and purpose of the First Amendment."

Here, the City of Pawtucket did nothing more than accommodate, in *de minimus* fashion, the cultural-historical-religious elements of America's past in the celebration of Christmas—following similar practices common worldwide. As Kauper has noted, by way of such accommodation governments are "contributing to religious freedom and making it more meaningful." P. Kauper, *Civil Liberties and the Constitution* 10 (1962).

When the people of Rhode Island ratified their Constitution, they echoed the religious beliefs of the Framers of the Federal Constitution. In their preamble they proclaimed:

> We, the people of the State of Rhode Island and Providence Plantations, grateful to Almighty God for the civil and religious liberty He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and to transmit the same unimpaired to succeeding generations do ordain and establish this constitution of Government.

B. Weiss, *God and America's History: A Documentation of America's Religious Heritage* 202 (Rev. ed. 1975). In ratifying the Bill of Rights, their descendants never imagined that one day the United States Constitution could be argued in such a manner as to limit the display of the faith they proclaimed, much less prohibit a city-sponsored seasonal, cultural display on private property that included a nativity scene.

The decision of the Court of Appeals blatantly conflicts with both the intentions of the Framers of the First Amendment and with fundamental constitutional principles. It is, therefore, essential that the conflict be resolved in favor of the petitioners.

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NO. 82-1256

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

DENNIS M. LYNCH, ET AL.,
PETITIONERS
V.
DANIEL DONNELLY, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING REVERSAL

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A. The present case does not involve a "captive audience," does not include any indoctrinative or teaching function, and does not present a "religious ceremony." Therefore, public school cases are inapposite. 3

B. The case does not involve invidious discrimination against any religion. 5

II. THE CITY'S ACTIONS IN THIS CASE AMOUNT TO AN "ACCOMODATION" OF (OR "NON-DISCRIMINATION" AGAINST) RELIGION, RATHER THAN AN ESTABLISHMENT OF RELIGION. 6

III. WHILE THE CONCERNS OF PLAINTIFFS AND THEIR AMICI, CENTERING UPON POTENTIAL DISCRIMINATION AGAINST PARTICULAR RELIGIONS, APPROVAL OF A PARTICULAR RELIGION, PSYCHOLOGICAL INFLUENCES UPON PERSONS OF OTHER RELIGIONS, AND INTERFERENCE WITH MENTAL PRIVACY, ARE SUBSTANTIAL AND VALID CONCERNS, THE

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

The Legal Foundation of America is a nonprofit corporation supporting the operations of a public interest law firm. Its goals include preservation of the market system of resource allocation, removal of unreasonable regulation, attainment of a better balance between the federal government and the states, and preservation of a rational system of criminal justice. LFA's interest in the case at bar results from the prospect of federal intervention that LFA respectfully submits will have counterproductive effects in State and local governments.

All litigation undertaken by LFA is approved by its Board of Trustees, a majority of whom are attorneys. LFA does not receive private fees but is supported by contributions.

SUMMARY OF ARGUMENT

I.

The context of this case differs radically from that of other recent decisions of this Court, including those relied upon by the

Court of Appeals. Public school cases furnish an unreliable guide since this case does not involve "coercion" of a captive audience, does not involve the "teaching" function of the State, and does not involve a "religious ceremony." Larson v. Valente is inapposite because the factor of invidious discrimination against particular religions, which was crucial to that case, is not present in this case.

II.

The case actually involves an "accomodation" of (or more appropriately, "non-discrimination" against) religion, rather than an "establishment" of religion.

The options available to a city such as Pawtucket include, first, extirpating all reference to the Christmas holiday, "root and branch" (which is not a realistic approach); secondly, exalting the secular aspects of the holiday while carefully removing all religious aspects (the approach of the Court of Appeals); or, thirdly, recognizing traditional symbols of the season without content-based discrimination (the approach of the City of Pawtucket).

The option chosen by the Court of Appeals—that of emphasizing the secular aspects of Christmas while censoring the religious—would cause real harm, for several reasons. It would require content-based discrimination, which would be difficult to administer because most symbols of Christmas are ultimately religious in origin. The resulting transformation of the holiday would involve government in a misleading, even dishonest act and thereby demean the institutions of government itself. It would interfere directly in the task of religious institutions, since it would give apparent government approval to the replacement of their interpretations of Christmas with the exaltation of the secular. And it would threaten and insult those who celebrate Christmas as a religious holiday by an official denial of the aspects they cherish most. Such an approach would not be "neutral" toward religion; it would fail the test of "neither advancing nor inhibiting religion."

III.

The concerns of plaintiffs and their amici are valid concerns; however, it is submitted that the display at issue simply does not offend those concerns. The potential for state discrimination against particular religious beliefs, though real, is not present in this case; and the nature of this display is such that it does not involve the promotion of religion, denial of religion, or interference with mental privacy of persons of any religious belief.

I. THIS CASE DOES NOT INVOLVE A PUBLIC SCHOOL SETTING, AND IT DOES NOT INVOLVE INVIDIOUS DISCRIMINATION AGAINST ANY RELIGION. THE CASES CITED BY THE COURT OF APPEALS THEREFORE DO NOT FURNISH A RELIABLE GUIDE HERE.

The Court of Appeals relied principally upon two cases, Lemon v. Kurtzman, 403 U. S. 602 (1971), and Larson v. Valente, 102 S. Ct. 1673 (1982). However, the context of this case is radically different from those cases, and they furnish an unreliable guide here.

A. The present case does not involve a "captive audience," does not include any indoctrinative or teaching function, and does not present a "religious ceremony." Therefore, public school cases are inapposite.

Pupils in a public school are a captive audience. They are forced to attend and to participate. In the present case, however, the audience is not captive in any sense, nor is it coerced. Persons not desiring to recognize the Christmas holiday can avoid the entire exhibit, and if some persons desire to celebrate the holiday, but wish to celebrate only its secular aspects, there is no greater offense if they should happen accidentally to see the creche than would result from the brief glimpsing of a creche in

any other location.[1] The interest in avoiding such sights is not of constitutional magnitude.

Furthermore, the primary function of public schools is to teach. This mission includes the judicially recognized duty to indoctrinate children in the culture, customs, values, and morals of our people. The indoctrinative mission arguably presents a different case for surgically excising religious elements from the public school context. The purpose of this display, however, was to promote enjoyment of Christmas, not to indoctrinate. In fact, the seeing of traditional religious symbols of Christmas within a dominant secular display is at least as likely to promote pluralistic values or to secularize religion as it is to promote religion.[2] This display was set up so that persons of all faiths—whether Catholic, Protestant or Jewish, Muslim or Baha'i, agnostic or atheist—could attend and enjoy it if they wished to observe the holiday at all. The prospect that sectarian purposes of any religious group might be advanced by it is remote in the extreme.

Finally, this was not a religious "ceremony," such as was involved in School District v. Schempp, 374 U. S. 203 (1963) (the school prayer case), nor did it emphasize the religious element in a religious context, as in Stone v. Graham, 449 U. S. 39

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1 The only difference is the legal issue involved in this very case, and the offense that might be taken by some from the resolution of a constitutional question, although real, simply cannot be allowed to affect the outcome.

2 Thus in Citizens Concerned for Separation of Church and State v. Denver, 526 F. Supp. 1310 (D. Colo. 1981), testimony was offered both by sincere Christians who felt the display demeaned the Christian religion and by non-Christians who argued that it promoted the Christian religion. See also Florey v. School Dist., 619 F.2d 1311, 1317 n. 5 (8th Cir. 1980). To some extent, the alleged "promotion" of Christianity and the alleged "diminution" of Christianity cancel each other. Admitting for purposes of argument, however, that each effect may take place in different people, Amicus would respectfully submit that the possibility of appreciable effect on the membership or beliefs of any sect from this display is remote.

(1980) (the Ten Commandments case). As Justice Brennan's opinion in Schempp indicates, even Bible readings in public schools are proper if done neutrally in the course of comparative religion or literature study. See also Florey v. School Dist., 619 F.2d 1311, 1314 (8th Cir. 1980). For example, a literature book with predominantly secular works but including excerpts from the King James Bible is not unconstitutional, even in public schools. The display in this case commemorates a holiday shared by all, and its inclusion of religious elements in a dominantly secular context, all traditional and appropriate to the season, is analogous to the literature book containing Bible verses as literature. (It should be emphasized, however, that this display is on stronger constitutional ground since it did not appear in the school context at all).

B. The case does not involve invidious discrimination against any religion.

The discriminatory treatment of minority religions condemned in Larson v. Valente, 102 S. Ct. 1673 (1982), is also absent from the present case. In Larson, there was active, purposeful, invidious discrimination against certain religions of which the legislature disapproved. The legislative history in Larson showed affirmatively the legislative intent to disadvantage these disliked sects and even included several legislators' hostile characterization of the enactment as an effort to "get at" certain religions, to "deal with" certain kinds of sects, or to "regulate the Moonies." Id.

The present case is fundamentally different. The inclusion of the creche in the present case was not an effort to disadvantage any religion or "get" the adherents of any faith. Indeed, the principles of Larson would be violated if the creche were to be censored because of its religious content; the result then would be government appropriation of a holiday with religious significance coupled with purposeful exclusion of certain traditional symbols inextricably connected with the holiday, precisely because of the religious content. Such a content-based distinction would discriminate against the religious, denigrate the significance of the holiday itself to those that celebrate it, and insult

practitioners of the faith involved.[3]

The Court of Appeals interpreted Larson v. Valente as requiring the excision of all influences that might pertain to any one religion from public life. Such an excision would be impossible to achieve. The effort to achieve it would be counterproductive and harmful.[4] This Court has had frequent occasion to note the degree to which the influence of religious symbols is woven into our culture.[5] Larson does not require that the cultural fabric be unravelled to extirpate all reference to religion; instead Larson signifies that invidious discrimination against religious sects is prohibited.

II. THE CITY'S ACTIONS IN THIS CASE AMOUNT TO AN "ACCOMODATION" OF

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3 See section II of this Brief infra.

4 Because religious influences are inextricably interwoven with our public life, see note 5 infra, it is nearly always impossible to insist on excising them completely and absolutely, without doing harm to other rights or interests.

For example, in one case, a school carefully banned spontaneous voluntary prayer activities in unused school rooms. This ban was part of an honest and conscientious effort to censor the religious to avoid establishment; this Court appropriately held, however, that it amounted to an unconstitutional infringement on the rights of the affected students to free expression. Widmar v. Vincent, 454 U. S. 263 (1981). The present case involves slightly different, but equally significant, kinds of harm that would flow from an "absolutist" approach. See section II of this Brief infra.

Absolutism is inappropriate in establishment-clause and free exercise-clause cases. "It is difficult to explore the implications of either of these clauses in complete isolation from the other . . . . [because] the two clauses interact . . . ." W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 1163 (1980).

5 See, e.g., School Dist. v. Schempp, 374 U. S. 203 (1963) ("It is true that religion has been closely identified with our history and culture"); Engel v. Vitale, 370 U. S. 421 (1962) ("The history of man is inseparable from the history of religion"); Zorach v. Clauson, 343 U. S. 306 (1952) ("We are a religious people whose institutions presuppose a Supreme Being").

(OR "NON-DISCRIMINATION" AGAINST) RELIGION, RATHER THAN AN ESTABLISHMENT OF RELIGION.

The City of Pawtucket has three essential options with respect to Christmas: first, it can carefully censor all references to the holiday, "root and branch;" secondly, it can excise all religious symbolism and confine its recognition of Christmas only to secular symbols; or, third, it can recognize traditional symbols of Christmas without discriminating on the basis of content against either those that are religious or those that are secular in significance.

The first option—that of removing Christmas from the City's lexicon altogether—was actually suggested by the district court in this case. It is not, however, a real option at all. At the very least, merchants will rightly insist that the City address their needs, and in countless other City activities the existence of the holiday must be recognized. [6]

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6 The most famous statement of the interrelationship of City functions and the religious is that of Mr. Justice Douglas, in Zorach v. Clauson, 343 U. S. 306, 312 (1952):

> The First Amendment, however, does not say that in every and all aspects there shall be a separation of Church and State. . . . That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. . . . Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this honorable Court."

The second option consists of an exaltation of the secular as the "true" aspect of Christmas, coupled with systematic extirpation of the religious. This approach amounts to content-based discrimination against the religious solely because it is religious.[7] The approach of excising traditional religious symbols on the basis of their content is condemned by the reasoning of Larson v. Valente and is likely to be counterproductive to first amendment values for several reasons.

First, the current holiday is itself religious in origin. Such traditional symbols as trees, bells and Santa Claus have religious origins, and they still retain religious significance to some people. The next step in the reasoning of the Court of Appeals is that public references to St. Nicholas would become unconstitutional.

And what if municipal employees want to have a Christmas party, or sing carols, no differently than other employees in private businesses? Cf. Florey v. School Dist., 619 F.2d 1311 (8th Cir. 1980):

> Today, carols are sung with regularity on public and commercial television and are played on public address systems in offices, manufacturing plants and retail stores in every city and village. See T. Coffin, The Book of Christmas Folklore (1973); R. Myers, Celebrations, The Complete Book of American Holidays; 5 Encyclopedia Americana 693 (International ed. 1968).
>
> Many carols have a religious theme; some do not. As in the centuries gone by, some persons object to the singing of carols with a religious basis in any place but the church or home because they feel that to do so debases religion; others have the same objection but because they feel it enhances religion. We take no part in this argument, it being entirely clear to us that carols have achieved a cultural significance that justifies their being sung in the public schools of Sioux Falls, South Dakota, if done in accordance with the policy and rules adopted by that school district.

Id. at 1316-17 n. 5.

7 This Court has had several occasions in which to condemn "content-based" distinctions among items of religious significance. E.g., Lemon v. Kurtzman, supra, 403 U. S. at 620; Larson v. Valente, supra, 102 S. Ct. at 1688; Widmar v. Vincent, supra, 454 U. S. at 263.

Litigation like the case at bar would proliferate as the identification of other symbols in the mind of some with their particular religious traditions would similarly make their inclusion unlawful.[8] In short, it is impossible to excise religious symbolism neatly and surgically from Christmas.

Secondly, for government to appropriate Christmas and change its traditions in order to fit governmental purposes is a misleading, even dishonest act, that denigrates government itself. As Judge Campbell said in dissenting from the decision below, "It seems a little like maintaining a holiday known as 'Washington's birthday' while extirpating all reference to George Washington. . . . [The excision] has an almost Orwellian twist."[9] The City of Pawtucket should not be forced to engage in such conduct.

Third, it is quite clear that such an approach—exalting the secularized aspects of the holiday while systematically excising all symbols that some people cherish most about it—is demeaning, even alarming, to those whose religion is thus denied by government. To such people, this approach is felt as hostile and discriminatory.[10]

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8 See authorities cited in note 6, supra. "[To] determine which words and activities fall within 'religious worship and religious teaching' . . . could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.'" Widmar v. Vincent, supra at n. 11.

9 Amicus does not argue, of course, that the harm done by this case bears any relationship to that done by Orwell's fictional government. The harm is primarily in making the government participate in a charade that degrades its institutions, making them appear silly.

10 In Citizens Concerned for Separation of Church and State v. Denver, 526 F. Supp. 1310, 1314 (D. Colo. 1981), which involved a similar display, the court admitted into evidence several packets of letters to public officials from citizens on the ground such letters showed the state of mind of citizens with respect to the display. The court found that "removal of the nativity scene would be viewed by [the letter writers] as endorsement by the City of a position inimical to

The final reason against this option, and the most compelling, is that it would not be "neutral" as to religion. Today, as in the past, commercial activity threatens to frustrate the legitimate purposes of religious institutions at Christmas. Clergy expend considerable effort to counteract what would otherwise be a commercial appropriation of the observance. They must work every year to remind practitioners that the meaning of Christmas within their institutions is not properly exemplified by its secularized aspects, such as wreaths, gifts or sales volumes. The exaltation of implicitly "approved" secularized and pagan symbols by government threatens this function. At the same time, the intentional excision of other, equally traditional symbols solely on the basis of their religious content amounts to an official denial of religion. This approach is actually hostile, not neutral, toward religion. If a government practice must "neither advance nor inhibit religion," Lemon v. Kurtzman, supra, then distinctions in the displaying of traditional symbols solely because of differences in content fails the test.[11]

As Mr. Justice Goldberg wrote in School District v. Schempp,

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

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their faith." The most common state of mind, the court found, "was anger." These are the reactions of persons who believe they are threatened with content-based regulation and who feel the applicable distinctions as invidious discrimination.

11 Such "content-based" distinctions have frequently been criticized by this Court. See note 6 supra and accompanying text.

That is what has happened in this case.

It must be recognized that "accomodation" of religion, in which government tolerates and indeed refrains from discriminating against religion, is not the same as establishment of religion. Cf. Zorach v. Clauson, 343 U. S. 306 (1952) (Douglas, J.) ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. *For it then respects the religious nature of our people and accomodates the public service to their spiritual needs*") (emphasis added). Accomodation and nondiscrimination with respect to the religious is the third option described above, and that is the course chosen by the City here.

III. WHILE THE CONCERNS OF PLAINTIFFS AND THEIR AMICI, CENTERING UPON POTENTIAL DISCRIMINATION AGAINST PARTICULAR RELIGIONS, APPROVAL OF A PARTICULAR RELIGION, PSYCHOLOGICAL INFLUENCES UPON PERSONS OF OTHER RELIGIONS, AND INTERFERENCE WITH MENTAL PRIVACY, ARE SUBSTANTIAL AND VALID CONCERNS, THE DISPLAY IN QUESTION HERE SHOULD BE HELD LAWFUL PRECISELY BECAUSE IT DOES NOT OFFEND THOSE CONCERNS.

The arguments made here are not in derogation of the concerns expressed by the plaintiffs. The power of the State can be used, and historically has sometimes been used, to support a state religion or to suppress the beliefs or practices of others. It is submitted, however, that this case simply does not present such a situation. [12]

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12 Plaintiffs and their amici may well argue that, since other cities in other cases in the future may infringe their interests more deeply, the present case is the one in which to draw a line—to "nip the

It does not present it, first, because the inclusion of the creche here was done merely because it was a traditional symbol of Christmas, not for any establishmentarian purpose or with establishmentarian effect. Secondly, this display—taken as a whole, as it must be for constitutional purposes—could be enjoyed by any person desiring to celebrate the holiday, whatever his or her faith or lack thereof. Finally, excision of the creche would itself be a harmful and counterproductive discrimination on religious grounds. These considerations should affect the Court's application of the three-pronged Lemon v. Kurtzman test, which itself is an effort at balancing the need to avoid establishment with the need for accomodation.

CONCLUSION

The decision of the Court of Appeals should be reversed. This Court should articulate a standard for cases of this nature recognizing that the public school context and invidious discrimination cases present different issues. At the same time, the Court should recognize the concerns of plaintiffs and their amici as legitimate, and should protect against displays that might insult any religion.

Respectfully submitted,

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establishment of religion in the bud," if only to avoid having to litigate the same sort of issue repeatedly in every such case. Although there is room for sympathy with such a point of view, the fact is that it is impossible in any one case to draw a permanent, universally applicable line in so complex and inherently conflicting an area as this. To put the matter differently, one cannot "nip an establishment of religion in the bud" without the risk of harm to other valid interests. See notes 3-6 supra and accompanying text. Furthermore, the context-based distinctions urged by plaintiffs and their amici may themselves lead to a proliferation of new litigation. See note 8 supra.

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No. 82-1256

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS LYNCH, Individually And As Mayor Of The City of Pawtucket, RICHARD A. MUMFORD, Individually And As Finance Director For The City Of Pawtucket, And GUY DUFAULT, Individually And As Director Of Department Of Parks And Recreation Of The City of Pawtucket, And The CITY OF PAWTUCKET,

Petitioners,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER And AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF REVERSAL

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does Municipal Sponsorship of a Traditional and Dominantly Secular Christmas Display Which Includes a Creche Violate the Establishment Clause?

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Petitioners,

v.

DANIEL DONNELLY, GEORGE KRIEBEL, ROBERT GOODWIN, GREG FRAZIER And AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF or Foundation) is a non-profit corporation organized and existing under the laws of the District of Columbia for the pur-

pose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF, which has offices in Washington, D.C. and Dallas, Texas, has more than 200,000 members, contributors and supporters throughout the United States, including the State of Rhode Island, whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to cases involving the constitutional rights of citizens to be free from excessive government regulation and unnecessary interference with traditional liberties. The Foundation believes, and this Court has recognized, that Americans are by nature a religious people. Accordingly, WLF seeks to advance the interests of its members, the citizens of Rhode Island, and the public at large by urging this Court to reverse the court below. The First Circuit presently holds that a municipality violates the establishment clause whenever it supports the inclusion of a creche in a Christmas display. This novel decision ignores first amendment jurisprudential principles as articulated by this Court and seeks to deny the religious heritage of the Christmas holiday.

The Foundation has appeared before this Court as *amicus curiae* on numerous past occasions. *See e.g.*, *Zant v. Stephens*, 51 U.S.L.W. 4891 (June 22, 1983); *United States v. Ptasynski*, 51 U.S.L.W. 4674 (June 6, 1983); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *General Building Contractors Assoc., Inc. v. Commonwealth of Pennsylvania*, 102 S.Ct. 3368 (1982); and *United Steel Workers v. Weber*, 443 U.S. 193 (1979). More specifically, WLF is presently representing several Congressmen-intervenors in opposition to a legal challenge by atheist Madalyn Murray O'Hair to remove congressional chaplains from the Congress. *Murray v. Buchanan*, No. 81-1301 (D.C. Cir. filed Sept. 22, 1982).

The Washington Legal Foundation can bring to this case a perspective not presently represented by the parties in interest which will assist this Court in obtaining full consideration of the public interest issues involved. The present parties are primarily concerned with the immediate end results of this lawsuit, namely the constitutionality of incorporating the creche in question within the municipality's annual Christmas display. For this reason, the long-term effects and deeper philosophical issues surrounding this controversy may be obscure. WLF will address these issues in the court of demonstrating why the city's right to include the creche furthers the general public interest.

Both parties have consented to the filing of this *amicus curiae* brief.

STATEMENT OF THE CASE

In the interest of judicial economy, *amicus* adopts the statement of the case provided in Petitioner's brief.

SUMMARY OF ARGUMENT

The First Circuit Court of Appeals was incorrect in applying a strict scrutiny analysis to determine whether the inclusion of a creche in the City of Pawtucket's traditional Christmas display is constitutional under the establishment clause of the first amendment. Under an appropriate application of the three-part *Lemon* test it is clear that the City's articulated purpose for including the creche was secular in nature, the inclusion neither had the effect of advancing nor inhibiting religion and the City's action resulted in no excessive entanglement with religion.

To affirm the First Circuit's ruling would be to sanction hostility to the religious heritage of our nation and disaffirm the principle of benevolent neutrality mandated by the establishment clause decisions of this Court. For all these reasons, the lower court should be reversed.

ARGUMENT

I. THE FIRST CIRCUIT COURT OF APPEALS WAS INCORRECT IN APPLYING A STRICT SCRUTINY ANALYSIS TO DETERMINE WHETHER THE INCLUSION OF A CRECHE IN THE CITY OF PAWTUCKET'S CHRISTMAS DISPLAY IS CONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

The first amendment to the United States Constitution states in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." By incorporation through the due process clause of the fourteenth amendment, the first amendment's prohibition against official support of, and affiliation with, religious philosophies and institutions applies equally to the actions of state and local governments. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Everson v. Board of Education*, 330 U.S. 1, 8 (1947).

Amicus acknowledges at the outset the difficult task confronting any court called upon to reach a determination as to whether a challenged government activity runs afoul of the first amendment's establishment clause. As Justice Powell noted, these types of cases present "some of the most perplexing questions to come before this Court." *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). However, while the problems presented may be difficult, the method of their resolution has become routine:

> [T]he now well defined three-part test that has emerged from our decisions is a product of considerations derived from the full sweep of the Establishment Clause cases. Taken together these decisions dictate that to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, e.g., *Epperson v. Arkansas*, 393 U.S. 97 [89 S.Ct. 266, 21 L.Ed.2d 228]

> (1968), second must have a primary effect that neither advances nor inhibits religion, e.g., *McGowan v. Maryland*, 366 U.S. 420 [81 S.Ct. 1101, 6 L.Ed.2d 393] (1961); *School District of Abington Township v. Schempp*, 374 U.S. 203 [83 S.Ct. 1560, 10 L.Ed.2d 844] (1963), and, third, must avoid excessive government entanglement with religion, e.g., *Walz v. Tax Comm'n*, 397 U.S. 604 [90 S.Ct. 1409, 25 L.Ed. 2d 697] (1970). See *Lemon v. Kurtzman*, 403 U.S. 602, 612-614 [91 S.Ct. 2105, 29 L.Ed.2d 745] (1971); *Tilton v. Richardson*, 403 U.S. 672, 678 [91 S.Ct. 2091, 29 L.Ed.2d 790] (1971). (footnote omitted.)

Nyquist, 413 U.S. at 772-73.

The current establishment clause test outlined above was articulated for the first time in *Lemon v. Kurtzman*, 403 U.S. 603 (1971). In the succeeding twelve years this Court has consistently employed the tripartite "*Lemon* test" either to strike down or to uphold governmental action challenged under the establishment clause. *See, Stone v. Graham*, 449 U.S. 39 (1980); *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Hunt v. McNair*, 413 U.S. 734 (1973); and *Nyquist*, 413 U.S. 756 (1973).

Clearly, the *Lemon* test is the only proper test to employ in order to determine whether a challenged state action violates the establishment clause. This Court has repeatedly made this point and, accordingly, lower state and federal courts have relied exclusively on the *Lemon* criteria when called upon to interpret the establishment clause. *See, e.g., Allen v. Morton*, 495 F.2d 65, 68 (D.C. Cir. 1975) ("The propriety of that three part test is well established. . . ."); *Fox v. City of Los Angeles*, 139 Cal. Rptr. 180, 182 (1977) ("Emerging from the line of establishment clause cases that have come before the Supreme Court is a tripartite test 'that has been clearly

stated, if not easily applied.' ") (*citing Meek v. Pittenger*, 421 U.S. 349, 358 (1975)); as well as a plethora of other establishment clause cases.

The district court below correctly applied the *Lemon* criteria, which it described as "the familiar three-prong test", to the facts of this case. *Donnelly v. Lynch*, 525 F. Supp. 1150, 1162 (D.R.I. 1981). On appeal, the United States Court of Appeals for the First Circuit reviewed the district court's decision under what it also regarded as "the familar tripartite test announced in *Lemon v. Kurtzman*". *Donnelly v. Lynch*, 691 F.2d 1029, 1033 (1st Cir. 1982). However, instead of relying solely upon the *Lemon v. Kurtzman* test, the appellate court felt that this Court's recently announced decision in *Larson v. Valente*, 102 S.Ct. 1673 (1982) (rendered subsequent to both the decision by the district court and oral argument before the court of appeals) made it "clear" that the *Lemon* test was no longer entirely appropriate. *Donnelly*, 691 F.2d at 1334. In its place, the First Circuit substituted a "strict scrutiny" test of the kind normally employed in equal protection cases, and held the City of Pawtucket's action to be unconstitutional because it was not justified by a "compelling governmental interest." *Donnelly*, 691 F.2d at 1334-35.

The First Circuit's reliance on *Larson v. Valente* is however, fundamentally misplaced. *Larson* involved a challenge to a Minnesota state statute which denied an exemption from certain registration and reporting requirements to religious organizations receiving more than half of their total contributions from nonmembers. The statute's "express design" was to burden select disfavored religious denominations, such as the Unification Church, while leaving older well-established religious organizations exempt from its reach. *Larson*, 102 S.Ct. at 1685, 1688. The legislative history surrounding the subject registration and reporting requirements in *Larson* demonstrated that the fifty percent rule "was passed in com-

mittee for the sole purpose of exempting the [Roman Catholic] archdiocese from the provision of the Act." 102 S.Ct. at 1688. Further, there was additional evidence that the rule was intended to deal with "certain religious organizations which are soliciting by direct mail and, according to one state senator, have 'people running around airports'." *Id.*

This Court was obviously correct in applying strict scrutiny analysis to the facts presented in *Larson*. It constitutes a plain violation of the principle of denominational neutrality contained in the establishment clause for a legislature to purposively enact a statute which selectively burdens disfavored religious groups. Laws "that discriminate *among* religions" in this fashion clearly warrant the application of strict scrutiny analysis. 102 S.Ct. at 1687. The situation is analogous to the strict scrutiny analysis afforded statutes that discriminate *among* the races in equal protection cases.

In the instant case, however, we are not presented with an invidious discrimination *among* religious denominations. Indeed, there are properly speaking *no* religious denominations involved in this case at all. Unlike the Minnesota Legislature in *Larson*, the City of Pawtucket is not "effect[ing] . . . favoritism among the sects" that would work to the deterrence of a specific religious belief. *Id.* at 1684 (*citing Abington School District v. Schempp*, 374 U.S. at 305.) The City has displayed a nativity scene. To that extent, it has accommodated a religious, though nondenominational group. However, the benign accommodation of religious groups has never been found unconstitutional by this Court. *Zorach v. Clausen*, 343 U.S. 306 (1952).

Put another way, what the City has done by erecting a Christmas display with a nativity scene in a privately owned park at Christmas time is merely to recognize that the Christmas holiday has an important *Christian* religious heritage. Accordingly, it has assisted in the display

of a creche to manifest this religious heritage aspect of the Christmas celebration. No specific *religious* denomination is either favored or disfavored by the display of the creche. Consequently strict scrutiny analysis is completely unwarranted. As the Eleventh Circuit recently recognized:

> Where the challenged action involves alleged discriminatory treatment of various religions by a government, the court has applied a "strict scrutiny/compelling governmental interest" standard similar to that which prevails under equal protection analysis . . . . no evidence has been presented concerning the state's refusal to approve construction of symbolic expressions of religions other than Christianity in state parklands. In the absence of any evidence of an "express design [to] burden or favor selected religious denominations" we conclude that the *Lemon* test remains the controlling legal standard .

American Civil Liberties Union of Georgia v. Robun County Chamber of Commerce, 678 F.2d 1379, 1390 n.20 (11th Cir. 1982). Nevertheless, the First Circuit has misread *Larson* as standing for the proposition that an act which discriminates between Christian and non-Christian religions must be evaluated under the test of strict scrutiny.

It is difficult to understand how acknowledging the Christian religious component of the Christmas holiday constitutes an act of "discrimination." What precisely are the non-Christian religions that are being "discriminated" against? Hinduism? Confucianism? But it is clear that December 25th has no religious significance for these religions and also that they have no connection whatsoever with this holiday which has obvious associations with the Christian religion.

The First Circuit fails to demonstrate any discriminatory impact on these "non-Christian religions" which might justify holding the City's actions unconstitutional.

Moreover, it even fails to first establish an *intent* on the part of the City of Pawtucket to purposefully discriminate against non-Christian religions which is the unavoidable prerequisite to any application of strict scrutiny analysis. *See Jefferson v. Hackney*, 406 U.S. 535 (1972) ("The acceptance of appellant's constitutional theory would render suspect each difference in treatment . . . , however lacking in racial motivation . . . and we do not find it required by the fourteenth amendment.") Impermissible discriminatory intent may not be inferred from a finding that the creche is a Christian religious symbol. To allow Respondent to make such an inference allows it to presuppose what it must prove, namely that the inclusion of the creche was an intentional endorsement on the part of the City of the Christian religion. Respondent must affirmatively prove that the City intended a discriminatory religious purpose. Evidence in the record concerning the stated purpose of the display (i.e., to promote goodwill and bolster commercial activity in the City), and the actions of City officers over the past forty years taken as a reflection of City adherence to this stated purpose, clearly do not support a finding of discriminatory or preferential intent.

As the City explained and the Court of Appeals for the District of Columbia Circuit recognized in *Allen v. Morton*, 495 F.2d 65, 69 (D.C. Cir. 1978), even if one accepts the proposition that the creche is a Christian religious symbol, it is also a recognized element of the commemoration of the Nation's celebration of Christmas as a national holiday in its depiction of one of the most traditional aspects of our national history associated with Christmas. Because the nativity scene has acquired substantial secular significance in the celebration of this national holiday, allegations of discrimination or preference in favor of Christianity are unsupportable. The creche is simply one of this nation's traditional Christmas symbols, and, as this Court has stated in *McCollum v. Board of*

Education, 333 U.S. 203, 256 (1982): ". . . Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee [of denominational neutrality] that conflicts with the accepted habits of our people."

In short, it is simply a historical fact that the Christmas holiday has Christian overtones associated with it. It can hardly be said to constitute "discrimination" against non-Christian religions to recognize this fact. If it did, then it would logically follow, as the dissent below noted, that Christmas as a national holiday itself is unconstitutional since such state recognition of the birth of Christ would clearly favor the Christian religion over all others and thereby impermissibly "burden" those other non-Christian religions. *See, Donnelly v. Lynch*, 691 F.2d at 1038 (Campbell, J. dissenting). Such a result would clearly be absurd.

The First Circuit's use of strict scrutiny analysis should be rejected for one final reason. If its use in establishment cases of this nature were sanctioned by this Court, widespread confusion would be engendered in all lower federal and state courts. After years of striving to articulate a clear, consistently-applied test for passing on the constitutionality of government interaction with religion, this Court should not sanction a decision which will cast the validity of that method in doubt and leave lower court judges vacillating in uncertainty between the two tests.

II. THE CITY'S ACTIONS SATISFY THE THREE-PART *LEMON* TEST AND ARE CONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

As demonstrated in Part I, *supra*, the First Circuit erred in applying the strict scrutiny analysis of *Larson v. Valente* to the case at bar. The district court correctly applied the traditional three-part test first enunci-

ated by this court in *Lemon v. Kurtzman* in order to determine whether the establishment clause had been violated but reached an incorrect result.

A. The City Of Pawtucket's Purpose For Including The Creche In Its Traditional Christmas Display Was Clearly Secular

Under the first prong of the establishment clause test set down by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the government action under scrutiny must be found to have a secular purpose. This "purpose test" has generally received loose application, and in most cases any showing of probable secular purpose has been accepted as sufficient. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-8 (1978). Thus, the district court should have accorded a great deal of weight to the City of Pawtucket's ostensible and articulated purposes in including the creche in its Christmas display especially in the absence of evidence showing these motivations to be self-serving or merely post-hoc rationalizations.

The City advanced three entirely secular motivations for its actions: the comprehensive exposition of the cultural history of the American celebration of Christmas; the attraction of holiday shoppers to the City's commercial district within the auspices of revitalization efforts; and the spreading of the holiday messages of peace and good will. *See Donnelly v. Lynch*, 525 F. Supp. at 1162.

In view of the fact that the City of Pawtucket had erected and maintained similar traditional displays and decorations throughout the City during the Christmas season for over forty years the alleged motivations could hardly be said to be post-hoc or self-serving. Nevertheless the district court ignored these arguments and found that because the creche is a "patently religious symbol," its use demonstrated a *per se* impermissible purpose. *Donnelly v. Lynch*, 525 F. Supp. at 1172. The United States Court of Appeals for the First Circuit inexplicably agreed

with the district court's "finding" that the City was "unable to advance *any* legitimate secular purpose for inclusion of the creche in the outdoor display" despite the fact, as noted above, that the City advanced three legitimate secular purposes for its actions. *Donnelly v. Lynch*, 691 F.2d 1029, 1035 (1982) (emphasis added).

The district court's finding of an impermissible purpose solely on the basis of the religious nature of the symbol is clearly erroneous. *Amicus* does not dispute the fact that the creche is an inherently religious symbol. "However, merely because the creche is a religious symbol, courts may not, as the *Donnelly* court did, infer an impermissible purpose. Legislative purpose must be established irrespective of the nature of the instrument." Comment, PUBLICLY-FUNDED DISPLAY OF RELIGIOUS SYMBOLS: THE NATIVITY SCENE CONTROVERSY, 51 Cin. L. Rev. 353, 369 (1982) (footnotes omitted). As the Supreme Court of Oregon noted when passing upon the constitutionality of the erection of a large cross in a municipal park: "it has been uniformly held that in determining the validity of either a cross or a nativity scene on public property, the controlling question is not whether such a cross or nativity scene is a religious symbol, but whether the purpose of its display is religious or secular." *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338, 346 (1976). Therefore, although the presence of a patently religious symbol, such as the creche, in conjunction with state-sponsored activities automatically triggers the application of the *Lemon* test it may not be used to raise a presumption of an impermissible purpose.

The City's primary motivation for the inclusion the creche, i.e., its traditional association with the holiday, cannot be challenged even though the nativity scene also has religious connotations. Recognition of the religious nature of a nativity scene is merely recognition of the fact that the influence of religious symbolism is inescapable during the Christmas season. The secular and reli-

gious aspects of Christmas have been intertwined throughout history and it would be impossible to attempt to separate the two. *See Citizens Concerned For Separation of Church & State v. City and County of Denver*, 526 F. Supp. 1310, 1313 (D. Colo. 1981). Surely then government action that has as its purpose the accommodation of the religious nature of the American people and the Christmas holiday itself is not for that reason alone impermissible. *Fox v. City of Los Angeles*, 139 Cal. Rptr. 180, 183 (1977). *See also, Abington School District v. Schempp*, 374 U.S. 203, 306 where Justice Goldberg in his concurring opinion states:

> Neither the state nor this Court can *or should* ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed under certain circumstances the First Amendment may require that it do so (emphasis added).

In this instance, the nativity scene was used to passively acknowledge the religious heritage of the holiday and no evidence exists to demonstrate a purposeful intent on the part of the City either to promote the participation by anyone in the affairs of any religious organizations or sect, or to confer an imprimatur of government approval on Christianity. *Cf., Paul v. Dade County*, 202 F.2d 833, 835 (1967) (string of lights forming a Latin cross on courthouse found secular in purpose as part of County's Christmas street decorations).

It is appropriate to ascertain government purpose by looking at the entire context of its presentation or the use of a religious symbol. In the instant case, the incorporation of the creche within the scheme of the City's Christmas display is strong indicia of secular purpose

since it is only part of a larger secular display which also includes 2500 Christmas lights, Christmas trees, figurines, snowmen, Disney characters, a live Santa Claus and a wishing well. Further, there is no evidence that the City had at any time denied requests for inclusion of the symbols of other religions in this or any other display or approved of religious ceremonies in front of the creche. *See, Fox v. City of Los Angeles*, 139 Cal. Rptr. at 185. Additionally, the tradition of including the creche in the City's display is a time honored one, extending over four decades. As the court noted in *McCollum v. Board*, 333 U.S. 203, 256 (1948), "devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the Constitutional guarantee that conflicts with the *accepted habits of our people*," (emphasis added). Indeed the purpose here of providing a colorful and complete depiction of the nation's Christmas celebration is no more objectionable than "that of a postage stamp bearing a reproduction of a religious painting or a Government sponsored museum display illustrating various religious or holiday customs." *Allen v. Morton*, 495 F.2d 65, 69, n.3 (D.D.C. 1973). Thus the City's actions clearly satisfy the first prong of the *Lemon* tests.

B. Including A Creche In The City's Predominantly Secular Christmas Display Does Not Have The Direct And Immediate Effect Of Advancing Or Inhibiting Religion

In order to satisfy the second prong of the *Lemon* test, the government action must have a primary effect that neither advances nor inhibits religion. *Lemon v. Kurtzman*, 403 U.S. 603, 612-613 (1971). It is important to note at the outset that this Court has upheld government action challenged under the establishment clause, even though a religious organization derives some incidental benefit, where the *primary effect* has not served to ad-

vance religion. *See, e.g., Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (allowing state aid to colleges and universities for nonsectarian expenditures regardless of religious affiliation). Such a conclusion is mandated by the recognized establishment clause requirement of benevolent neutrality; to hold otherwise would be to sanction hostility to religion, and to encourage an impermissible preference for non-believers over believers.

As Justice Douglas noted:

> The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines that manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.

Zorach v. Clausen, 343 U.S. at 312.

This Court has articulated two guidelines for application of the "effect" test of *Lemon* in *Hunt v. McNair*, 413 U.S. 734, 743 (1973):

> Aid normally may be thought to have a primary effect of advancing religion [1] when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or [2] when it funds a specifically religious activity in an otherwise substantially secular setting.

Clearly the display of a creche as part of a dominantly secular municipal Christmas celebration by the City of Pawtucket falls outside of these twin guidelines. First of all there is no particular religious "institution" *per se* which is being "advanced" by the display. As already noted above, the City has merely accommodated a reli-

gious, although nondenominational, symbol. Second, unlike the situation in *Gilfillan v. City of Philadelphia*, 637 F.2d 924 (3rd Cir. 1980) where the City of Philadelphia's expenditure of $200,000 to construct a special platform *used to celebrate a Mass* by the Pope was held to violate the establishment clause, no "religious activity" occurred. To reiterate, it must be

> . . . borne in mind that this creche was *but part of* a larger display in the same location which included a talking wishing well, a Santa's house inhabited by a live Santa who distributed candy, trees of various sizes, reindeer, and 21 cutout figures including a clown, dancing elephant, robot and teddy bear. The whole melange, including the creche, was nothing more nor less than a potpourri of well-recognized Christmas symbols. Had a solitary creche been displayed in July, one might see it as designed to serve chiefly religious ends, since there would then be no holiday with which it was particularly identified. But creches and Santas in December are as typically symbolic of Christmas as turkeys and Pilgrims in November are symbolic of Thanksgiving.

Donnelly v. Lynch, 691 F.2d at 1037 (Campbell, J. dissenting.)

Focusing, therefore, not on the creche itself but on the secular context of the entire display, it is clear that any benefit conferred to the Christian religion as a whole is insubstantial. The presence of numerous other secular figures, Santa Claus, reindeer, the wishing well, wooden representations of stars and trees, snowmen, Disney characters, Christmas trees and Christmas lights all serve to diminish the religious impact of the creche. None of the activities which take place in the display area during the holiday season are religious in character or in any way specifically connected with the creche. Thus, no threat of government indoctrination, such as in the public school

setting, or religious interference, such as in *Larson* through application of uneven reporting/registration requirements, accompanies the "temporary, static gesture of acknowledgement here challenged." *Fox*, 139 Cal. Rptr. at 184. The display occurs only once a year and is confined to the historic museum grounds of a private park.

Additionally, the rationale of the majority in *Fox* is particularly persuasive here.

> The conclusion is inescapable that if the challenged custom really conferred a measurable benefit upon religion, members of various sects and faiths would either have expressed a desire for equal recognition and aid, or in the alternative, lodged their objection to the practice of prejudicial sovereign endorsement.

139 Cal. Rptr. 180, 184 (1977). Although the mere longevity of the City's traditional display cannot isolate it from constitutional scrutiny, the forty year backdrop of near total absence of discontent by either the general public or by particular religious denominations indicates further that whatever benefits are conferred upon religion in this case are remote and inconsequential. Thus, the city of Pawtucket's inclusion of a creche in its Christmas display satisfies the second prong of the *Lemon* test.

C. The City of Pawtucket's Christmas Display Does Not Involve It In Excessive Entanglement With Religion Nor Result In Political Divisiveness

The third prong of the *Lemon* test focuses on the degree and quality of government interaction with religion that the challenged activity promotes. *Lemon v. Kurtzman*, 403 U.S. at 615. The first part of this test, "administrative entanglement," applies where the activity brings government officials into close, ongoing contact with the affairs of religious institutions, "thereby endangering the independence and integrity of both Church and State." *Id.* at 615-20. As the district court below stated:

> Unquestionably administrative entanglement has not occurred in this case. The evidence shows that Pawtucket purchased the components and designed the layout of the Hodgson Park display without interaction with any of the community's churches or religious organizations.

Donnelly v. Lynch, 325 F. Supp. 1150, 1179 (1981). As the display is planned entirely by City officials, this case is thus clearly distinguishable from *Allen v. Morton* where government officials sat on a governing board responsible for the display with professional clerics. *Citizens Concerned*, 526 F. Supp. at 1315.

However, the district court below did find that the City's activities violated the second part of the entanglements test, "political divisiveness." It must be noted, however, that the Supreme Court has never held that the potential for political divisiveness is alone sufficient to invalidate a government's action under the establishment clause. It is merely "a warning device," triggering a full *Lemon* analysis. *Committee for Public Education v. Nyquist*, 413 U.S. at 798. *See also* Gaffey, POLITICAL DIVISIVENESS ALONG RELIGIOUS LINES: THE ENTANGLEMENT OF THE COURT IN SLOPPY HISTORY AND BAD PUBLIC POLICY, 24 St. Louis U. L.J. 205 (1980). Further, the Court of Appeals, although finding it unnecessary to rely on the political divisiveness analysis, summarily disposed of the district court's reliance on this factor:

> . . . we are unwilling to place much weight on the court's determination that the City's actions risked political divisiveness along religious lines. As the court noted, this factor alone has never been held sufficient to invalidate governmental action, and First Amendment scholars have questioned and criticized the political divisiveness strand of the entanglement test on historical and prudential grounds.

Donnelly v. Lynch, 691 F.2d 1029, 1035 (1st Cir. 1982) (citations omitted). This result is consistent with other

cases. For example, in *Fox*, 139 Cal. Rptr. at 185, the court stated: "considering the negligible impact of the practice [of stringing lights on a courthouse in the shape of a Latin cross] and its uneventful history, no real danger of divisive political potential is herein presented." Similarly the district court in *Citizens Concerned*, 508 F. Supp. at 827, found:

> As to alleged political divisiveness, the court observes that in light of the secular purpose of the total display and a non-religious primary effect, no religious group or groups are being benefitted and divisiveness on religious lines is not likely to be intensified.

The district court relies heavily on the outcry provoked by the ACLU's challenge to this traditional Christmas display as conclusive "proof" that the City's sponsorship of the display has produced a division in the community along religious lines. *Donnelly v. Lynch*, 525 F. Supp. at 1182-84. The fact is, however, that it is the ACLU that has fostered this division *not* the City. For well over forty years the City displayed a creche in the community all without any apparent dissension. It has only been when the ACLU has attempted to foster a hostility to the religious element of the traditional Christmas celebration that a division has occurred. For this Court to sanction the lower court's decision on this point would be to encourage those elements of society which seek to foster divisions in the community along religious lines.

In light of the absence of concrete evidence to the contrary, the potential for political divisiveness resulting from the City of Pawtucket's inclusion of the creche in its dominantly secular Christmas display is below the level worthy of judicial notice. As the City's actions satisfy all other parts of *Lemon*, this Court is without precedent to find a violation of the establishment clause based solely on this last insufficient consideration.

CONCLUSION

The Washington Legal Foundation believes that the federal court below incorrectly held that the City of Pawtucket's sponsorship of a traditional Christmas creche at Christmas time violated the establishment clause. To allow this ruling to stand would be tantamount to requiring the complete elimination of all religious symbolism from publicly sponsored Christmas celebrations and would be to manifest an impermissible hostility toward religion. For all these reasons the lower court should be reversed.

Respectfully submitted,

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No. 82-1256

In the Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS LYNCH, ET AL., PETITIONERS

v.

DANIEL DONNELLY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

Whether a municipality's inclusion of a nativity scene in an annual traditional Christmas celebration violates the Establishment Clause of the First Amendment to the United States Constitution.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

The City of Pawtucket, Rhode Island, has, for the past 40 years, included a small nativity scene as part of an elaborate annual display connected with the celebration of Christmas. The courts below held that the City's practice violates the Establishment Clause of the First Amendment to the United States Constitution. The United States has a substantial interest in this matter, which raises the question whether the Constitution requires us rigidly to exclude from our public ceremonies and celebrations all acknowledgments of the religious elements in our national traditions.

The United States, like the City of Pawtucket and countless other state and local governments, has long participated in the celebration of the Christmas season. Congress has declared Christmas to be a national holiday (5 U.S.C. (& Supp. V) 6103), and the

United States has in past years sponsored Christmas pageants that included nativity scenes. See *Allen* v. *Hickel*, 424 F.2d 944 (D.C. Cir. 1970); *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973). Since the days of the Pilgrims, we have devoted, as a Nation, one day every year to giving thanks to God. More broadly, the federal government has, from the earliest days of the Republic to the present, felt free to acknowledge and recognize that religion is a part of our heritage and should continue to be an element in our public life and public occasions. The United States has a deep and abiding interest in maintaining this long-standing tradition.

INTRODUCTION AND SUMMARY OF ARGUMENT

Woodenly applying legal tests devised for different situations, the court of appeals here invalidated a traditional form of public celebration, one that cannot sensibly be perceived as a serious threat to the fundamental values protected by the First Amendment. Our submission is that it was not the purpose of the Framers of the Constitution to require government wholly and rigidly to exclude religion from our public occasions. Indeed, this Court has long assumed that traditional acknowledgments of the religious elements of our heritage fit comfortably within the zone of permissible governmental interaction with religion. A contrary conclusion, such as that reached by the court of appeals, does not further the principles of the First Amendment. Instead, it mandates an artificial and undesirable sterility in public life, in which one important and enriching aspect of our history and culture is treated as illegitimate and therefore nonexistent. Excising religion from our public commemorations is not only not required by the Constitution, but runs counter to this Court's teachings that government should "accommodate[]

the public service to [our people's] spiritual needs." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

In our view, the court of appeals erred in its assumption that Establishment Clause doctrines developed by this Court in other contexts must be mechanistically applied to the very different question presented by this case. The "strict scrutiny" test enunciated in *Larson* v. *Valente*, 456 U.S. 228 (1982), and applied by the court of appeals in this case, was conceived in the context of a state statute that placed onerous legal obligations on "unpopular" religious denominations. The inclusion of a traditional nativity scene in a large civic display, designed to provide public participation in the celebration of the Christmas holiday, is not such a religious preference at all; it is simply a natural acknowledgment of the fact that the holiday includes a religious aspect.

The familiar three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), also seems inapposite and artificial here—although petitioners' brief shows that Pawtucket's practice does meet that test. The traditional religious references and reminders that fill American public life should not depend, for their validity, on the dubious assertion that they are wholly perfunctory and meaningless. It was never the purpose of the Framers to secularize our public life so rigidly that we cannot continue to mark our public holidays in a manner that includes traditional acknowledgments of their religious character. We therefore ask the Court to rule that the First Amendment does not mandate the contrived exclusion of religion from our public life exemplified by the opinion of the court of appeals, holding that, if government is to participate in commemorating Christmas at all, it must somehow ignore or conceal the holiday's religious significance.

ARGUMENT

THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT WAS NOT INTENDED TO PROHIBIT GOVERNMENTAL ACKNOWLEDGMENT OF RELIGION AS A PART OF OUR NATION'S HERITAGE

A. The Historical Evidence Shows That The Establishment Clause Of The First Amendment Was Not Intended To Exclude Religion From Our Public Occasions

1. This Court's "Establishment Clause precedents have recognized the special relevance in this area of Justice Holmes' comment that 'a page of history is worth a volume of logic.'" *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 777 n.33 (1973), quoting *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). See also *Walz* v. *Tax Commission*, 397 U.S. 664, 675-676 (1970). The Court has been sensitive to the fact that history sheds light on the meaning of the Establishment and Free Exercise Clauses and their application to particular circumstances; it has steadfastly "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*" (397 U.S. at 671; emphasis added). See, *e.g.*, *McGowan* v. *Maryland*, 366 U.S. 420, 431 (1961) (history of Sunday Closing Laws relevant to Establishment Clause inquiry); *Everson* v. *Board of Education*, 330 U.S. 1, 8-16 (1947) (history of period when Establishment Clause was fashioned and adopted is relevant to determination of validity of modern state law authorizing reimbursement for student transportation to private schools).

What was the Framers' purpose in providing that "Congress shall make no law respecting an establish-

ment of religion, or prohibiting the free exercise thereof * * *" ? At the time the amendment reached the floor of the House of Representatives, it read: "[N]o religion shall be established by law nor shall the equal rights of conscience be infringed." 1 Cong. Deb. 757 (1834) (hereinafter cited as "Debates"). This language prompted concern among some representatives that the amendment would prohibit nondiscriminatory state aid to religion; others read it as perhaps suggesting an even broader prohibition.[1] James Madison, who played a leading role in the drafting and adoption of the First Amendment,[2] sought to quiet such concerns by explaining (1 Debates 757) that:

> [H]e apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.

During the course of debate, the language of the amendment was changed to its current form. See *Everson* v. *Board of Education, supra*, 330 U.S. at 39 n.27 (Rutledge, J., dissenting). Throughout the debates, however, Congress adhered to the central purposes set forth by Madison: Congress may not es-

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[1] 1 Debates 757-760. One representative voiced a fear that such language "might be thought to have a tendency to abolish religion altogether" (*id.* at 757). Another expressed concern that "the words might be taken in such latitude as to be extremely hurtful to the cause of religion" (*ibid.*).

[2] See, *e.g.*, *Everson* v. *Board of Education, supra*, 330 U.S. at 13; *id.* at 28, 31-43 (Rutledge, J., dissenting).

tablish a national church, may not prefer one sect over another, and may not compel worship contrary to conscience. See 3 J. Story, *Commentaries on the Constitution of the United States* § 1871 (1833).[3]

On the other hand, there is no evidence whatever that the Framers contemplated a contrived exclusion of religion from our public life or sought to disable the State from acknowledging that religion is an important part of our heritage. As the Court correctly observed in *Zorach* v. *Clauson*, *supra*, 343 U.S. at 312, "[t]he First Amendment * * * does not say that in every and all respects there shall be a separation of Church and State." Nor was the Establishment Clause so understood by the Framers themselves.

2. Both before and after the drafting and enactment of the Establishment Clause, governmental acknowledgment of a Supreme Being was a naturally accepted feature of American public life. Government officials invoked the name of God, asked His blessings upon our Nation, and encouraged our people to do the same. The Declaration of Independence, now enshrined in the National Archives, proclaims it "self-evident that all men are created equal, that they are endowed by their Creator with certain unalienable Rights * * *." The Republic was established, the authors of the Declaration wrote, "appealing to the

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[3] Congress also intended to prohibit the federal government from interfering with the various established state religions existing at the time of ratification of the First Amendment. See *McGowan* v. *Maryland*, *supra*, 366 U.S. at 440-441. Nevertheless, the provisions of the First Amendment have since been made applicable to the states by incorporation into the Due Process Clause of the Fourteenth Amendment. See, *e.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940).

Supreme Judge of the world for the rectitude of our intentions" and "with a firm reliance on the Protection of Divine Providence * * *."

In September 1774, the delegates to the first session of the Continental Congress resolved on the second day of proceedings to open the next day's meeting with a prayer by an invited clergyman—the Reverend Jacob Duché. 1 Journals of the Continental Congress 26 (1774) (hereinafter cited as "Journals"). Reverend Duché continued to deliver prayers to the Continental Congress during the following two years. See 2 Journals 12, 13 (1775); 5 Journals 530 (1776). When he resigned from the office of Chaplain, he was succeeded by two new chaplains (6 Journals 1034 (1776)), and eight years later the Continental Congress decided that chaplains should be elected annually (27 Journals 683 (1784)).

In 1787, Benjamin Franklin, no adherent of religious orthodoxy, proposed that each day's session of the Constitutional Convention be opened with a prayer (5 J. Elliot, *Debates on the Adoption of The Federal Constitution* 254 (2d ed. 1836)):

> I have lived, sir, a long time, and, the longer I live, the more convincing proofs I see of this truth—*that God governs in the affairs of men.* * * *
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> I therefore beg leave to move that henceforth, prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this assembly every morning * * *.[4]

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[4] For a number of reasons, Franklin's proposal was never adopted. Among other things, the delegates were concerned about the lack of funds for a chaplain's pay and the fact that institution of a prayer practice well after the start of the Convention might be taken as a sign of desperation. See 5

When George Washington was inaugurated as our first President, he went, accompanied by both Houses of Congress, to St. Paul's Chapel in New York City for a concluding religious service conducted by the first Episcopal bishop of New York. See A. Stokes & L. Pfeffer, *Church and State in the United States* 87 (rev. 1st ed. 1964). The decision to hold the service was the product of a joint resolution adopted by both houses of Congress (*ibid.*). Similarly, the First Congress, which drafted and adopted the First Amendment, simultaneously retained chaplains to offer public prayers at the beginning of each legislative day. See 1 Journal of the Senate, 1st Cong., 1st Sess. 10 (1789); 1 Journal of the House of Representatives, 1st Cong., 1st Sess. 11-12 (1789); Act of Sept. 22, 1789, ch. 17, Section 4, 1 Stat. 71.

Thanksgiving and fast-day proclamations also were common before and after ratification of the First Amendment. John Adams described one such fast-day proclamation in a letter to his wife, Abigail Adams (*reprinted in* A. Stokes & L. Pfeffer, *supra*, at 83):

> We have appointed a Continental fast. Millions will be upon their Knees at once before their Great Creator, imploring His forgiveness and blessing; His smiles on American Councils and arms.

The day after proposing the First Amendment, Congress called on President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and

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J. Elliott, *supra*, at 253-256; A. Stokes & L. Pfeffer, *Church and State in the United States* 84 (rev. 1st ed. 1964).

signal favours of Almighty God." *Id.* at 87. The President responded by proclaiming November 26, 1789, as a day of thanksgiving on which to "offer[] our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions * * *." 1 J. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, at 64 (1896-1899). Washington continued this practice on other occasions during his Administration, see *id.* at 179-180, as did other Founding Fathers who later served as President.[8]

It thus seems obvious that the men responsible for the drafting and enactment of the Establishment Clause never contemplated that they were eradicating religious traditions from American public life. Indeed, Story stated that at the time of the adoption of the First Amendment, "[a]n attempt to level all religions, and to make it a matter of state policy to

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[8] John Adams issued at least two thanksgiving proclamations and James Madison issued at least four. See 1 J. Richardson, *supra*, at 268-270, 284-286, 513, 532-533, 558, 560-561. Thomas Jefferson thought such proclamations would violate the Constitution and did not issue any. See A. Stokes & L. Pfeffer, *supra*, at 88. Nonetheless, Jefferson later encouraged the establishment of denominational schools of religion on or adjacent to the public University of Virginia campus which would "offer the * * * advantage of enabling the students of the University to attend religious exercises * * *." 19 *The Writings of Thomas Jefferson* 415 (Memorial ed. 1904). Jefferson also wrote: "And can the liberties of a Nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?" *Reprinted in* W. Berns, *The First Amendment and the Future of American Democracy* 13-14 (1976). See also *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 246-247 (1948) (Reed, J., dissenting).

hold all in utter indifference, would have created universal disapprobation, if not universal indignation." 3 J. Story, *Commentaries on the Constitution of the United States*, *supra*, at § 1868.

The words and actions of the Founding Fathers and the First Congress are, of course, of special significance. This Court has observed that the First Congress "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." *Myers* v. *United States*, 272 U.S. 52, 174-175 (1926). Accord *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 6-7; *United States* v. *Ramsey*, 431 U.S. 606, 616-617 (1977); *Boyd* v. *United States*, 116 U.S. 616, 623 (1886). As the Court went on to say in *Myers* (272 U.S. at 175):

> This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.

There is no good reason to depart from this wise principle in this case. The Framers of the Establishment Clause obviously thought it both natural and constitutional for government to acknowledge our religious heritage and participate in celebrations that include a religious element. Although Christmas itself was not widely celebrated in this country before the 1800's and did not become a national holiday until 1870 (see Pet. App. A15 to A16), the Framers clearly participated in the official and public celebration of Thanksgiving—a day dedicated, after all, to

the giving of thanks to God. The creation and maintenance of legislative chaplaincies, and the frequent invocation of God's blessing on all of the Nation's public and ceremonial occasions, also demonstrate that the Framers would have been confounded and astonished by the suggestion that government is not free to acknowledge and help commemorate an occasion such as Christmas or that, in doing so, it must somehow contrive to conceal and ignore the holiday's religious aspects.

3. Today, as in the earliest days of the Republic, the government continues to recognize that our Nation's heritage includes a religious element. Coins have borne the legend "In God we trust" since 1865 (31 U.S.C. 324a), and this phrase was made the national motto in 1956 (36 U.S.C. 186).[4] The House Report stated (H.R. Rep. No. 1959, 84th Cong., 2d Sess. 2 (1956)): "It will be of great spiritual and psychological value to our country to have a clearly designated national motto of inspirational quality * * *." In 1950, Congress designated Memorial Day as a day of "prayer for a permanent peace" (36 U.S.C. 169g). In 1952, Congress directed the President to proclaim a National Day of Prayer each year (36 U.S.C. 169h). In 1954, Congress added the words "under God" to the Pledge of Allegiance (36

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[4] The constitutionality of the use of this phrase was upheld in *Aronow* v. *United States*, 432 F.2d 242 (9th Cir. 1970). The court explained (*id.* at 243) that:

> It is quite obvious that the national motto and the slogan on coinage and currency "In God We Trust" has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.

U.S.C. 172). The House Judiciary Committee explained that the words were added to acknowledge our religious heritage (H.R. Rep. No. 1693, 83d Cong., 2d Sess. 3 (1954)):

> This is not an act establishing a religion or one interfering with the "free exercise" of religion. A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase "under God" recognizes only the guidance of God in our national affairs.

Many patriotic songs similarly acknowledge our dependence upon God and invoke His blessings. One stanza from the National Anthem (36 U.S.C. 170) includes the phrases, "May the heav'n rescued land Praise the Pow'r that hath made and preserved us a nation" and "this be our motto, 'In God is our Trust.'" The fourth stanza of "America" proclaims:

> Our fathers' God, to Thee, Author of Liberty, to Thee we sing.
> Long may our Land be bright with freedom's holy light,
> Protect us by Thy might, great God our King.

As in Washington's day, Presidential proclamations and messages continue to mark Thanksgiving as a day of prayer.[7] These Presidential proclamations invoke the religious aspects of our national heritage without embarrassment. President Roosevelt's 1944 Thanksgiving Day Proclamation offers a partic-

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[7] See, *e.g.*, Proclamation No. 4883, 46 Fed. Reg. 56153 (1981) (Thanksgiving Day, 1981). Virtually every President since Washington has proclaimed a national day of prayer and thanksgiving. See 3 A. Stokes, *Church and State in the United States* 180-126 (1950).

ularly vivid example (Proclamation No. 2629, 9 Fed. Reg. 13099 (1944)):

> [I]t is fitting that we give thanks with special fervor to our Heavenly Father for the mercies we have received individually and as a nation and for the blessings He has restored, through the victories of our arms and those of our Allies, to His children in other lands.
>
> * * * * *
>
> To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas. Let every man of every creed go to his own version of the Scriptures for a renewed and strengthening contact with these eternal truths and majestic principles which have inspired such measure of true greatness as this nation has achieved.

Presidential proclamations and messages also have issued to commemorate Jewish Heritage Week (Proclamation No. 4844, 46 Fed. Reg. 25077 (1981)) and the Jewish High Holy Days (17 Weekly Comp. Pres. Doc. 1058 (Sept. 29, 1981)). Congress recently called upon the President to proclaim 1983 as the " 'Year of the Bible' in recognition of both the formative influence the Bible has been for our Nation, and our national need to study and apply the teachings of the Holy Scriptures" (Pub. L. No. 97-280, 96 Stat. 1211). On February 3, 1983, the President did in fact proclaim 1983 to be the "Year of the Bible" (Proclamation No. 5018, 48 Fed. Reg. 5527 (1983)).[8]

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[8] Constitutional challenges to the "Year of the Bible" are pending in *Zwerling* v. *Reagan*, No. CV-83-2504-R (C.D. Cal.) and *Gaylor* v. *Reagan*, No. 83-C-985-D (W.D. Wis.).

Similarly, when Presidents make public statements in connection with the celebration of Christmas, they naturally and frequently include references to the fact that this is a religious celebration as well as a secular holiday.[9] A nativity scene has been displayed in the East Room of the White House at least since the time of the Trumans and perhaps even longer. In federally-financed chapels on military bases, in hospitals, prisons and at our Service Academies, Christmas is celebrated as a religious event for those who adhere to the Christian religion. Federally-funded museums display religious art and traditional symbols, and the Postal Service issues seasonal postage stamps that reproduce religious paintings. See *Allen* v. *Hickel*, 424 F.2d 944, 949 (D.C. Cir. 1970).

Finally, government buildings and monuments are filled with religious language and imagery, from the nearly omnipresent "Anno Domini" chiseled into cornerstones, to the depiction of the Ten Commandments in the frieze facing every lawyer who addresses this Court. Religious subjects are depicted in murals in the library and outside the Great Hall of the Department of Justice.[10]

Further elaboration is surely unnecessary; we remind the Court simply of its own well-known observa-

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[9] See, *e.g.*, *Remarks on Lighting the National Community Christmas Tree*, 17 Weekly Comp. Pres. Doc. 1389 (Dec. 17, 1981); *Remarks on Lighting the National Community Christmas Tree*, 16 Weekly Comp. Pres. Doc. 2817 (Dec. 18, 1980); *Remarks Before Lighting the National Community Christmas Tree*, 3 Weekly Comp. Pres. Doc. 1730 (Dec. 15, 1967).

[10] Outside the Great Hall, for example, are large paintings of Jesus, of Moses with the Ten Commandments, and of Thomas Aquinas, along with portraits of secular legal luminaries such as Coke, Kent, Solon, Socrates and Holmes.

tion in *Zorach* v. *Clauson*, *supra*, 343 U.S. at 313, that "[w]e are a religious people whose institutions presuppose a Supreme Being."

B. This Court's Establishment Clause Decisions Do Not Forbid The Government To Acknowledge Our Religious Heritage

1. As this Court has observed in an Establishment Clause context, using the words of Justice Holmes: " 'If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.' " *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 678, quoting *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922). For this reason, no doubt, the Court has long assumed that it is valid to continue to make traditional use of religious symbols in government. For example, in *Engel* v. *Vitale*, *supra*, 370 U.S. at 435 n.21, the Court noted:

> There is of course nothing in the decision reached here that is inconsistent with the fact that * * * there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

Similarly, in *Abington School District* v. *Schempp*, 374 U.S. 203, 213 (1963), the Court stated:

> This background [of the Founding Fathers' religious devotion] is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, "So help me God." Likewise each House of Congress provides through its Chaplain an opening prayer, and the sessions of this Court

> are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God.[11]

Commentators, too, have recognized the constitutionality of governmental celebration of our religious heritage. The point was made most vividly by Dean Erwin N. Griswold (Griswold, *Absolute Is In the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 Utah L. Rev. 167, 174 (1963)):

> [T]o say that [the First Amendment] require[s] that all trace of religion be kept out of any sort of public activity is sheer invention. Our history is full of these traces * * *. Must all of these things be rigorously extirpated in order to satisfy a constitutional absolutism? What about Sunday? What about Christmas? Must we deny our whole heritage, our culture, the things of spirit and soul which have sustained us in the past and helped to bind us together in times of good and bad?
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> Does our deep-seated tolerance of all religions—or, to the same extent, of no religion—require that we give up all religious observance in public activities? Why should it? It certainly never occurred to the Founders that it would.

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[11] Individual Justices of this Court have expressed similar views in separate concurring or dissenting opinions. See *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 303-304 (Brennan, J., concurring); *Engel* v. *Vitale*, *supra*, 370 U.S. at 446-450 (Stewart, J., dissenting); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 253-254 (Reed, J., dissenting).

What *has* concerned the Court are those government practices that, it found, coerce religious orthodoxy or inescapably have that effect (*e.g.*, *Stone* v. *Graham*, 449 U.S. 39, 42 (1980)). The Court has also condemned practices that it found to involve the government directly and unequivocally in religious exercises (*e.g.*, *Abington School District* v. *Schempp*, *supra*, 373 U.S. at 223-224). But for the government to participate in holiday celebrations that have religious as well as secular elements, and in that context to acknowledge our religious heritage, is not a "religious exercise," or an interference with the rights of conscience of non-believers.[12] Nor have such practices "given the remotest sign of leading to an established church or religion" (*Walz* v. *Tax Commission*, *supra*, 397 U.S. at 678).[13] In fact it is, precisely, our tradition of toleration that suggests that government should be allowed to give some recognition to the belief of many of our people that religion should continue to play some role in our public occasions.

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[12] Cf. R. Morgan, *The Supreme Court and Religion* 23 (1972) ("'Freedom of conscience' as used by Madison and some others referred specifically to the question whether or how one believed in God. It did not mean that the federal government could not force people to do things or pay taxes for things which offended them, only that people could not be coerced into making or contributing to any profession of belief regarding a Supreme Being").

[13] Nor is it plausible to suggest that such government celebrations are "but the 'foot in the door' or the 'nose of the camel in the tent' leading to an established church" (*Walz* v. *Tax Commission*, *supra*, 397 U.S. at 678). If government celebrations of our religious heritage "can be seen as the first step toward 'establishment' of religion, * * * the second step has

2. Jefferson's celebrated reference to a "wall of separation between church and State" may suggest that all of these governmental acknowledgments of religion must be condemned. But the Court has recognized that "[i]t has never been thought either possible or desirable to enforce a regime of total separation." *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, 413 U.S. at 760. Such "total separation" would clearly require an elaborate effort to reshape our practices and rhetoric, one that would betoken a systematic hostility to religion—in effect, the establishment of irreligion. But hostility toward religion is as prohibited by the Constitution as is governmental establishment of religion. See, *e.g.*, *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 306 (Goldberg, J., concurring); *Zorach* v. *Clauson*, *supra*, 343 U.S. at 314; *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 211-212 (1948).

Instead, government's proper role is one of "*benevolent* neutrality" toward religion, in which "there is room for play in the joints." *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 669 (emphasis added). Religion is inextricably imbedded in our national culture and our official holidays and ceremonies. It pervades our public as well as our private lives because of our history and because recognition of this aspect of our history is of deep concern to many of our people. To ignore this heritage and this deeply felt concern by eradicating all evidence of its influence would be to substitute "callous indifference" for "benevolent neutrality." *Zorach* v. *Clauson*,

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been long in coming. Any move that realistically 'establishes' a church or tends to do so can be dealt with 'while this Court sits'" (*ibid.*).

supra, 343 U.S. at 314; *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 669.[14]

3. What does "benevolent neutrality" call for in the context of this case? We must recognize that Christmas has become, in part, a secular celebration. But its meaning is also religious, and it is its religious meaning that is commemorated by millions of Americans through services and through worship. Must government mark Christmas by pretending that it is *purely* secular, as required by the court of appeals? Does the Constitution require government either to cease celebrating Christmas altogether, or to make affirmative efforts to distort its participation in those celebrations by extirpating all references to the events that Christmas commemorates? In our submission, the First Amendment simply does not require such artificial bowdlerization and aesthetic impoverishment of our public life.

Moreover, the courts below certainly failed to consider the Pawtucket nativity scene in the context of its display. As demonstrated by the record (see Pet. Br. 3-5), the creche is simply one part of the

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[14] A perceptive reminder that "neutrality" in this context is a subtle and problematical concept was provided by Sir Walter Moberly, in the context of debate over the role of religion in the English public universities (W. Moberly, *The Crisis in the University* 55-56 (1949)):

> On the fundamental religious issue [the existence of God], the modern university intends to be, supposes it is, neutral, but it is not. Certainly it neither inculcates nor expressly repudiates belief in God. But it does what is far more deadly than open rejection; it ignores Him * * *. It is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary, you teach that it is to be omitted * * *. And you teach this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby insinuate it silently, insidiously, and all but irresistibly * * *.

City's multi-faceted Christmas display. The entire celebration combines all of the elements of a traditional American Christmas. The Constitution does not require government to excise one element or to pretend that it no longer exists. As Judge Campbell recognized in dissent (Pet. App. A19):

> It seems a little like maintaining a holiday known as "Washington's Birthday" while extirpating all reference to George Washington. Christmas, so long as called by that name, inescapably recalls the birth of the founder of Christianity. To "save" it by pretending to the contrary has an almost Orwellian twist. I do not think that constitutional values are furthered by this kind of thinking.

4. We believe that the court of appeals was led astray by its assumption that doctrinal formulations developed by this Court in other contexts must be woodenly applied in all Establishment Clause cases. Justice Powell reminded us in *Wolman* v. *Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part), that "analytical tidiness" must sometimes be sacrificed in order to avoid "blind absolutism." Similarly, Justice Reed observed that "[d]evotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people." *Illinois ex rel McCollum* v. *Board of Education*, *supra*, 333 U.S. at 256 (Reed, J., dissenting).

a. In its zeal for "analytical tidiness," the court of appeals concluded (Pet. App. A11) that it was bound to review the practice challenged in this case under the "strict scrutiny" test enunciated in *Larson* v. *Valente*, 456 U.S. 228 (1982). That test was

formulated in the context of a state statute that imposed onerous legal obligations on some religions but not on others; the Court stated that the statute "clearly grant[ed] denominational preferences of the sort consistently and firmly deprecated in [the Court's] precedents." *Larson* v. *Valente*, *supra*, 456 U.S. at 246 (footnote omitted).[15] We believe that the inclusion of a manger scene as part of a large traditional civic display is not a "denominational preference" at all and that application of the *Larson* "strict scrutiny" test in this situation is confusing and inapposite. To recognize that Christmas has something to do with the birth of Christ is not to "prefer" Christianity over other religions, but simply to acknowledge its constituent meaning. To state that government may not prefer one religion over another does not mean that government must pretend that religious holidays have no specific meanings to different religions.[16] Religious pluralism does not require gov-

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[15] *Larson* involved a Minnesota statute granting preferential treatment to the well-established churches that receive more than half of their charitable contributions from their members. Other, less entrenched religious organizations were to be subjected to various registration and reporting requirements. In striking down the statute, the Court noted that the law "was drafted with the explicit intention of including particular religious denominations and excluding others" (456 U.S. at 254). One state senator explained that " 'what you're trying to get at here is the people that are running around airports and running around streets and soliciting people and you're trying to remove them from the exemption that normally applies to religious organizations' " (*ibid.*, quoting legislative history on file with the Court).

[16] A nativity scene of course acknowledges Christian traditions that are not shared by all religions. But that result is inescapable once we decide that government may participate at all in the commemoration of Christmas. It is simply not

ernment to establish an official, homogenized, all-purpose form of religion of its own. By its ceremonial participation in the celebration of a Christian holiday, government does not "establish" Christianity and does not discriminate against other religions. It certainly does not act in any way to disfavor unpopular or unconventional religious views—the vice perceived by the Court in *Larson*. The *Larson* analysis should not be extended to wholly dissimilar situations posing no comparable threat to religious pluralism.[17]

b. The practice challenged in this case could be analyzed under the Court's now familiar three-part test, which requires that governmental action (1)

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possible for government to give uniform recognition to all religions in the context of commemorating one religion's particular holiday. By analogy, the court of appeals would presumably invalidate government's recognition of Jewish holidays (see page 13, *supra*) because the heritage of a single religious group is singled out for special mention. To say that government must acknowledge all religions whenever it mentions one simply makes no sense.

[17] Recently, the *Larson* "strict scrutiny" test was held to be inapplicable in a case involving an Establishment Clause challenge to a state's decision to permit a large, lighted cross to be erected on state park lands. *ACLU* v. *Rabun County*, 698 F.2d 1098, 1109 n.20 (11th Cir. 1983). The court noted that "no evidence has been presented concerning the state's refusal to approve construction of symbolic expressions of religion other than Christianity in state parklands" (*ibid.*), and concluded that the absence of such evidence rendered the *Larson* test inapplicable. Here, too, the record contains no evidence of petitioners' refusal to acknowledge the special occasions marked by other religious groups; on the contrary, the Mayor of Pawtucket testified to his willingness to display a menorah as part of the City's annual holiday celebration (J.A. 104).

"must have a secular legislative purpose"; (2) must have a "principal or primary effect * * * that neither advances nor inhibits religion"; and (3) "must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971). And petitioners have demonstrated that Pawtucket's practice fits comfortably within that test (see Pet. Br. 24-41).[18] We suggest, however,

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[18] The constitutionality of government-sponsored nativity scenes has been adjudicated by other courts under the three-part test. In *Citizens Concerned for Separation of Church & State* v. *City & County of Denver*, 526 F. Supp. 1310 (D. Colo. 1981), the court upheld Denver's nativity display which, like that of petitioners, is part of an annual Christmas celebration. The court found that the display, including the creche, had a secular legislative purpose (*id.* at 1311), that it was "not an endorsement by the City of the Christian faith, but rather one of general celebration of the holiday season" (*id.* at 1315), and that no entanglement problems were present (*ibid.*).

In *Allen* v. *Morton*, 495 F.2d 65 (D.C. Cir. 1973), the court reviewed the federal government's participation in the annual Christmas Pageant of Peace, held each year on the Ellipse. The court ruled that the Pageant had a secular purpose (*id.* at 68-70), and that the inclusion of a creche had no more than a "remote and incidental effect" on religion (*id.* at 70-74). Nevertheless, the court held that the government's participation in the Pageant would have to be restructured because its association with the Pageant's co-sponsor, a private, non-profit corporation that included professional clerics on its board, had engendered excessive administrative entanglements. In particular, the government had become involved in conflicts among representatives of various religious groups represented on the board (*id.* at 74-75).

In response to the *Allen* decision, the Pageant of Peace has been restructured. The Pageant itself no longer includes a nativity scene in its display, but the National Park Service issues demonstration permits (see 36 C.F.R. 50.19) to private

that the three-part test (just like the strict scrutiny test) results in analytic overkill when applied to the type of government action under consideration here. As already noted, the Court has long assumed that syllogistic doctrinal analysis is unnecessary for the validation of certain traditional aspects of American public life even when these carry unmistakably religious overtones. The Court recently stated in another context, in applying the four-part test for determining whether an implied cause of action had been created by a particular statute, that "there is no need for us to 'trudge through all four of the factors when the dispositive question of legislative intent has been resolved.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 388 (1982), quoting *California* v. *Sierra Club*, 451 U.S. 287, 302 (1981) (Rehnquist, J., concurring in the judgment). Here, too, there is no need to "trudge through" the three parts of the *Lemon* test when it is clear that the challenged practice is not among the evils against which the Establishment Clause was directed.

Moreover, application of the three-part test to traditional, ceremonial activities of the type involved in this case tempts courts to engage in hypocrisy. It should not be necessary for a court to assert that the traditional religious references that fill American official life have lost all religious sig-

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groups that display a variety of religious symbols, including a nativity scene and a menorah, in areas adjacent to the Pageant. The present arrangement, which has never been challenged, is consistent with this Court's decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). See also *O'Hair* v. *Andrus*, 613 F.2d 931 (D.C. Cir. 1979) (rejecting Establishment Clause challenge to a Papal Mass conducted on the Mall under permit from the Park Service).

nificance in order to uphold them. This Court's sessions are opened by the traditional cry, "God save the United States and this honorable Court." Are we to say that the constitutional *validity* of this plea *depends* on it being wholly perfunctory, a piece of meaningless boilerplate? The fact that some—maybe many—actually understand this to be a plea for God's blessing should not force us to the unwelcome and unnecessary conclusion that the plea must be silenced. Similarly, a rigid application of the "secular purpose" inquiry should not force us to change our national motto from "In God We Trust" to "E pluribus unum" (an alternative considered and rejected by Congress). See H.R. Rep. No. 1959, *supra*, at 2. As we have demonstrated, it was never the purpose of the Framers to secularize government activities to the extent suggested by a literalistic and wooden reading of the *Lemon* language. The creche is one of the traditional symbols of a national holiday. It also retains religious significance. Courts should not be required to distort our past by pretending that such symbols have been "sanitized" by loss of all their religious meaning, so that it is now "safe" to display them.

Similarly, the "effect" component of the *Lemon* test seems excessive and even unworkable in the present context. It should not be necessary, for example, for courts to receive the testimony of a parade of psychologists, sociologists and philosophers, offering their subjective opinions on the "effect" of viewing religious symbols in particular contexts (see J.A. 71-90; 115-119; 122-124; 140-144), before reaching the conclusion that displays such as Pawtucket's do not constitute an establishment of religion.

Finally, as the court of appeals itself recognized (Pet. App. A12), the "excessive entanglement" inquiry is of limited utility here. In *Lemon*, the Court was concerned with the sort of administrative entanglement that might accompany financial support for parochial schools (403 U.S. at 619). No such problems arise when government acknowledges religion as a constituent part of our heritage. In fact, the district court in this case acknowledged the absence of administrative entanglement (Pet. App. A71); however, it stated that the challenged practice had caused "political divisiveness" because the City's ownership and display of the nativity scene had led to "anger, hostility, name calling, and political maneuvering, all prompted by the fact that someone had questioned the City's ownership and display of a religious symbol" (*id.* at A71, A72). The court of appeals was unwilling to place much weight on this determination (*id.* at A12), and rightfully so. If divisiveness is to be the test, then no religious symbol can withstand attack so long as the attack is mounted with sufficient fervor and publicity. In fact, the record here shows that there was no divisiveness at all until the filing of this lawsuit, less than a week before Christmas (J.A. 99, 105).

In summary, this Court should recognize expressly, as it has implicitly in the past, that the Establishment Clause does not prevent government from marking our public holidays in a manner that includes traditional references to and acknowledgments of their religious character.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 82-1256-CFX
Status: GRANTED

Title: Dennis Lynch, etc., et al., Petitioners
v.
Daniel Donnelly, et al.

Docketed:
January 26, 1983

Court: United States Court of Appeals
for the First Circuit

Counsel for petitioner: McMahon,William F.

Counsel for respondent: DeLuca,Amato A.

Entry	Date	Note	Proceedings and Orders
1	Jan 26 1983	G	Petition for writ of certiorari filed.
3	Feb 17 1983		Order extending time to file response to petition until March 27, 1983.
4	Mar 28 1983		Brief of respondents Daniel Donnelly, et al. in opposition filed.
5	Mar 30 1983		DISTRIBUTED. April 15, 1983
6	Apr 18 1983		Petition GRANTED.
			**********
7	May 20 1983	D	Motion of Anne Neamon for leave to proceed pro se for the purpose of filing a brief as amicus curiae filed.
9	May 25 1983		Order extending time to file brief of petitioner on the merits until June 30, 1983.
10	May 31 1983		DISTRIBUTED. 6/2/83. (Motion of Anne Neamon for leave to proceed IFP for purpose of filing amicus curiae).
11	Jun 6 1983		Motion of Anne Neamon for leave to proceed pro se for the purpose of filing a brief as amicus curiae DENIED.
12	Jun 10 1983		Brief of petitioner Dennis Lynch, et al. filed.
13	Jun 10 1983		Joint appendix filed.
14	Jun 20 1983		Record filed.
15	Jun 20 1983		Certified C.A. proceedings received.
16	Jun 24 1983		Brief amicus curiae of Legal Foundation of America filed.
17	Jun 23 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
19	Jun 30 1983		Brief amicus curiae of Washington Legal Foundation filed.
20	Jun 30 1983		Brief amicus curiae of United States filed.
21	Jul 1 1983		Brief amicus curiae of Coalition for Religious Liberty and The Freedom Council filed.
23	Jun 30 1983		Order extending time to file brief of respondent on the merits until August 10, 1983.
24	Jul 18 1983		Record filed.
25	Jul 18 1983		Certified original record & 2 envelopes of exhibits received.
26	Aug 11 1983		Brief amicus curiae of The American Jewish Committee, et al. filed.
27	Aug 11 1983		Brief amicus curiae of The Anti-Defamation League of B'nai B'rith filed.
28	Aug 15 1983		SET FOR ARGUMENT. Tuesday, October 4, 1983. (1st case)
29	Aug 13 1983		Brief of respondents Daniel Donnelly, et al. filed.
30	Aug 15 1983		CIRCULATED.

No. 82-1256-CFX

Entry	Date	Note	Proceedings and Orders
31	Aug 23 1983		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
32	Sep 16 1983	X	Reply brief of petitioners Dennis Lynch, et al. filed.
33	Oct 4 1983		ARGUED.